United States Court of Appeals

for the Second Circuit

APPENDIX

76-1393

ORIGINAL

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 76-1393

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

LOUIS E. WOLFSON, ELKIN B. GERBERT,

Defendants

LOUIS E. WOLFSON,

Defendant-Appellant.

APPENDIX ON APPEAL

Jacob Laufer, Esq.
Bass, Ullman & Lustigman
747 Third Avenue
New York, New York 10017

Bernard Fensterwald, Jr., Esq.
Fensterwald & McCandless
1707 "H" Street, N.W.
Washington, D.C. 20006

Rabinowitz, Boudin & Standard
30 East 42nd Street
New York, New York 10017

Attorneys for Defendant-Appellant

Robert B. Fiske, Jr., Esq.
United States Attorney for
the Southern District of
New York
One St. Andrews Plaza
New York, New York 10007

Attorney for Plaintiff-
Appellee

UNITED STATES COURT OF APPEALS
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Relevant Docket Entries

Date of Entry	Item
May 16, 1975	Louis E. Wolfson - Filed Deft's Notice of Petition for a Writ of Error Coram Nobis and motions for discovery, and an order assigning said petition and motions to a Judge other than the trial Judge.
May 16, 1975	Louis E. Wolfson - Filed Deft's Motions for Discovery.
June 16, 1975	Louis E. Wolfson - Filed Petition of Deft Wolfson addressed to Chief Judge Edelstein for Writ of Error Coram Nobis.
June 18, 1975	Wolfson - Filed Deft's Motion for recusal of Judge Palmieri . . . No Ret. Date Given.
July 23, 1975	Louis E. Wolfson - Filed OPINION #42837 in reference to Deft's Notice of Petition for a Writ of error coram nobis filed 5/16/75. MOTION DENIED, SO ORDERED - PALMIERI, J. (m/n)
July 23, 1975	Louis E. Wolfson - Filed MEMO ENDORSEMENT on defts motion for recusal of Judge Palmieri filed 6/16/75. MOTION DENIED. See opinion dated July 23, 1975, filed herein. PALMIERI, J.
August 21, 1975	Louis E. Wolfson - Filed Petitioner's Request for reconsideration of and supplemental memorandum on Motion for Recusal.
Sept. 16, 1975	Louis E. Wolfson - Filed MEMO ENDORSEMENT on Deft's Petitioner's Request for reconsideration of motion for recusal filed 8/21/75. The motion for reconsideration is GRANTED. The Court, after due reflection, adheres in all respects to its decision of July 23, 1975. See Opinion dated 9/16/75, filed herein. IT IS SO ORDERED - PALMIERI, J.
Sept. 16, 1975	Louis E. Wolfson - Filed OPINION #43068. The motion for reconsideration is GRANTED. The directions hereinabove set forth must be complied with before this Court will deal with the merits of the petition, and as so further indicated. - PALMIERI, J. (m/n)

Relevant Docket Entries (cont'd)

Date of Entry	Item
Nov. 13, 1975	Louis E. Wolfson - Filed affdvt of Bernard Fensterwald, Esq. with respect to a petition for a writ of Error Coram Nobis.
Jan. 12, 1976	Filed Govt's answer to affdvt of Bernard Fensterwald with respect for writ of error coram nobis.
Feb. 6, 1976	Filed reply of petitioner Wolfson to Govt's ANSWER to Fensterwald affdvt.
Feb. 9, 1976	Louis E. Wolfson - Filed opinion #43856 on May 16-75 deft filed a petition for a writ of error coram nobis *** petitioner's atty was requested to review all relevant documents and to submit an affdvt that would greatly clarify the matter **** The petitioner has given expression to his desire for a prompt disposition *** but he must give the Court and the U.S. Atty effective cooperation **** Palmieri, J. (m/n)
March 22, 1976	Louis Wolfson - Filed on manila envelope ordered sealed by the Court...Palmieri, J.
April 12, 1976	Louis Wolfson - Filed letter dated 3/22/76 *** Petitioner's atty has sent this Court a letter dtd 3/8/76 *** In view of this non-compliance on the part of petitioner's counsel, this Court is constrained to dispose of the matter on the merits *** This letter will be entered in the official records of the Court and should be construed as an order of The Court.... Palmieri, J.
April 20, 1976	Louis E. Wolfson - filed affdvt of Paul R. Grand dated 4/19/76.
April 20, 1976	Louis E. Wolfson - filed affdvt of Paul B. Galvani dated 8/14/75.
April 20, 1976	Louis E. Wolfson - filed Answer of U.S. to deft's petition for writ of error coram nobis.
May 7, 1976	L. Wolfson - Filed transcript of record of proceedings dated 2/19/76.

Relevant Docket Entries (cont'd)

Date of Entry	Item
May 10, 1976	L. E. Wolfson - Filed reply of petitioner Wolfson to Gov't answer.
June 1, 1976	Filed Supplemental answer of the U.S. to defts petition for writ of error coram nobis.
June 1, 1976	Filed affdvt of M. F. Armstrong dtd 5/21/76.
June 1, 1976	Filed affdvt of A. Macbeth, AUSA dtd 6/1/76.
June 1, 1976	Filed affdvt of W. A. McRitchie, dtd 5/21/76.
May 24, 1976	Filed affdvt of R. M. Morgenthau dtd 5/21/76.
July 26, 1976	Filed memo endorsed on petition for error coram nobis dated 5/16/75. Petition denied in all respects. See opinion. Palmieri, J. (m/n)
July 26, 1976	Filed opinion #44847. This is a voluminous petition to set aside the judgment of conviction of LOUIS E. WOLFSON entered on 11/28/67 *** petitioner's failure to obey repeated orders of the Court with respect to submission of his contentions, this petition must be denied. Petition denied in all respects. It is so ordered. Palmieri, J. mailed notices.
July 27, 1976	L. E. Wolfson - Filed answer of the U.S. to motion for recusal of Judge Palmieri.
Aug. 24, 1976	Louis E. Wolfson - Filed notice of appeal to USCA from an order entered on 7/26/76 dismissing petition for a writ of error coram nobis. Copy to: Angus C. Macbeth, AUSA... Ent. 8/24/76.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	66 CR. 720
	)	
	)	
LOUIS E. WOLFSON	)	

PETITION OF DEFENDANT WOLFSON
ADDRESSED TO CHIEF JUDGE EDELSTEIN
FOR WRIT OF ERROR CORAM NOBIS

Comes now petitioner Wolfson, seeking a writ of error coram nobis. The petition is addressed specifically to Chief Judge David N. Edelstein, requesting that disposition of the petition be assigned to a judge other than the trial judge, the Hon. Edmund Palmieri, for the purpose of determing whether the indictment against petitioner be dismissed and/or the judgment against him be vacated for the causes set forth in detail in the accompanying Memorandum of Law and Fact. This petition is verified and the Memorandum attached hereto is accompanied by affidavits and other documents in support thereof.

Filed simultaneously with the petition are a number of procedural motions regarding which, it is prayed, the Chief Judge will assign for consideration and disposition to the same judge as shall handle the petition. Each motion is also accompanied by a supporting Memorandum of Law and Fact.

The authorities supporting the right and duty of the Chief Judge to assign these petition and motions to a judge other than the trial judge are contained in Part III(M) of the accompanying Memorandum of Law and Fact.

Respectfully submitted:

FENSTERWALD & OHLHAUSEN
910 Sixteenth St., N.W.
Washington, D.C. 20006
Tel: (202) 223-1667

BY: Bernard Fensterwald, Jr.
BERNARD FENSTERWALD, JR.

Attorneys for Louis E. Wolfson

VERIFICATION

I, LOUIS E. WOLFSON, have read the above Petition and the accompanying Memorandum of Law and Fact in support thereof, and hereby swear on penalty of perjury that the facts set forth therein are true and correct to the best of my knowledge and belief.

Louis E. Wolfson
LOUIS E. WOLFSON

State of FLORIDA)
) ss
County of MARION)

Subscribed and sworn to before me this 7th day of MAY, 1975.

Isabelle M. Schley
Notary Public

My commission expires on NOTARY PUBLIC, STATE OF FLORIDA at LARGE MY COMMISSION EXPIRES DEC. 29, 1975 Bonded Thru General Insurance Underwriters.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	)	
	)	
v.	)	66 CR. 720
	)	
LOUIS E. WOLFSON	)	

MEMORANDUM OF LAW AND FACT
IN SUPPORT OF PETITION FOR
WRIT OF ERROR CORAM NOBIS

PART I

INTRODUCTION

Having served a jail sentence, petitioner is fully aware that the jails contain many who vociferously claim that they have been framed, rail-roaded, and persecuted. Few have any proof of their contentions and even fewer have, in fact, suffered any fundamental injustice.

However, that injustices do occur and that certain people have gone to jail as a result of prosecutorial and/or judicial persecution, rather than legal prosecution, is clear. Petitioner claims to be one of those who did go to jail not because he was guilty of a crime but because of the imperfections of our criminal justice system.

Why would a person, who has already served his sentence, persist in attempting to overturn his conviction and to prove his innocence? Petitioner states that his reasons, stated in reverse order of importance, are as follows:

- that he has paid a fine of $100,000 which he seeks to recover;
- that his business interests have suffered because of an unlawful conviction;

- that his reputation in the community has greatly suffered;
- that his health was very seriously, adversely, and permanently affected by his imprisonment;
- that he would like to do what he can to expose the fallacies and inequities in our criminal justice system with the hope that he might save at least a single other person from a similar, horrifying experience; and
- last, that he desires to help restore the people's confidence in our system of government, a confidence which has seriously been eroded in the last decade.

In this last regard, petitioner would bring to the attention of the Court the closing paragraph in Justice Brandeis' dissent in Olmstead v. United States, 277 U.S. 438, 485 (1928):

> Decency, security and liberty alike demand that Government officials shall be subject to the same rules of conduct that are commands to the citizens. In a Government of laws, existence of the Government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means - to declare that the Government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

This petition is being filed, pursuant to the All Writs Statute, 28 U.S.C. §1651, to request the Court to reopen the petitioner's case to enable him to demonstrate to the Court that the Government was itself a lawbreaker in the prosecution of its case against petitioner.

PART II

BRIEF HISTORY OF THE CASE

Petitioner Wolfson and one other person were indicted in October, 1966, and were charged with violating and conspiracy to violate Section 5 of the Securities Act of 1933, 15 U.S.C. §77(e), in connection with sales of the common stock of Continental Enterprises, Inc. ("Continental").

Mr. Wolfson was neither an officer nor a director of Continental, Inc., although he was a controlling stockholder. However, it is important to note that even after disposing of all of the stock which was the subject of the indictment, Wolfson continued to hold a 16% stock interest in Continental. In short, this case did not involve a complete sell-out on the part of the controlling stockholder.

Also, no fraud was charged or proved in this case. This was not a case where the Government claimed that the shareholders were defrauded. The fact that no fraud was involved was conceded by the Government in its opening statement to the jury and confirmed by the trial judge during the course of the trial when he said:

> "There is no fraud claimed in this case, nor is there a question of revealing anything in a registration statement other than that controlling persons were selling their stock."

This case, stripped of its non-essentials, was a claim by the Government that a registration statement should have been filed by Wolfson in which he would report that he was selling his Continental stock. Not only was there no fraud charged in this case, neither was there a concealment of any kind. All of the sales that were made by Wolfson were effected through the most reputable brokers in the business. Nominees were not used and profits were not concealed. Indeed, both the sales and the profits were fully reported by Wolfson on his tax returns. The principal legal issue in the case involved the construction of the statute under which Wolfson was charged.

Petitioner pleaded not guilty, and trial before Judge Palmieri and a jury commenced on September 6, 1967. On September 29, 1967, the jury returned a verdict of guilty on all counts against both appellants. Wolfson was sentenced to prison terms of one year on each count, to run concurrently, to pay fines totalling $100,000, and to pay the "costs of prosecution" under 18 U.S.C. §1918(b).

The conviction was appealed to the U.S. Court of Appeals for the Second Circuit, but the conviction was affirmed, 405 F.2d 779 (1968). Certiorari was denied by the U.S. Supreme Court, 394 U.S. 946 (1969).

A Motion for a New Trial on grounds of newly discovered evidence was made on October 9, 1968. The newly discovered evidence related to the question of the authenticity of the crucial document (designated Exhibit 21) upon which petitioner was convicted. A lengthy evidentiary hearing was had on the Motion, which was ultimately denied by Judge Palmieri, 297 F.Supp. 891 (1969). This denial was affirmed by the Second Circuit, 413 F.2d 804 (1969).

Petitioner paid his fine and the costs of prosecution and served his sentence at the federal facility at Eglin Air Force Base in Florida. Since his release on January 26, 1970, he has conducted a broad and costly private investigation to gather factual material to prove that he was illegally convicted. The results of that investigation unlie this petition.

Although there is much substantiating material which has been beyond petitioner's reach as a private citizen, he has gathered a mass of evidence, incorporated herein, which shows that his prosecution from its inception was conducted in an illegal manner, is void, and should be so declared.

PART III

CORAM NOBIS IS THE CORRECT PROCEDURAL VEHICLE TO REVIEW THE CONVICTION

A. Purpose and Scope of Writ of Error Coram Nobis

In general, the writ is used in cases where there is no other remedy, United States v. Morgan, 346 U.S. 502, 98 L.Ed. 248, 74 S.Ct. 247 (1954), for the purpose of reviewing, correcting or vacating a judgment in the same court in which it was rendered, Strang v. United States, 53 F.2d 820 (5th Cir. 1931), on account of errors which are (a) extrinsic to the record, Moon v. United States, 106 App. D.C. 301, 272 F.2d 530 (D.C. Cir. 1959); (b) affect the validity and regularity of the proceedings, United States v. Moore, 166 F.2d 102 (7th Cir. 1948), cert. den. 334 U.S. 849; (c) were unknown at the time of the trial to the party seeking relief without fault on his part, United States v. Cariola, 323 F.2d 180 (3rd Cir. 1963); and (d) if known, would have prevented or invalidated the judgment. Allen v. United States, 162 F.2d 193 (6th Cir. 1947). In petitioner's view, these criteria fit his case in all regards; and he believes that coram nobis

is the only remedy available to him under federal law.

B. An Extraordinary Writ

There is no question but that coram nobis is an extraordinary remedy and that its use should not be allowed except under circumstances compelling such action to achieve justice. The leading case in the United States Supreme Court on this point is United States v. Morgan, supra; a more recent case and the leading case in the Second Circuit is United States v. Keogh, 271 F.Supp. 1002 (S.D.N.Y. 1967), affirmed in part 391 F.2d 138, on remand 289 F.Supp. 265; see also United States v. Malinsky, 310 F.Supp. 523 (S.D.N.Y. 1970); United States v Deitsch, 321 F.Supp. 1356 (S.D.N.Y. 1971), affirmed 451 F.2d 98, cert. den. 92 S.Ct. 682, 404 U.S. 1019, 30 L.Ed.2d 667; United States v. Cariola, supra; Woykovsky v. United States, 309 F.2d 381 (9th Cir. 1962), cert. den. 83 S.Ct. 1889, 374 U.S. 838, 10 L.Ed.2d 1059; Johnson v. United States, 344 F.2d 401 (5th Cir. 1965); Kagen v. United States, 360 F.2d 30 (10th Cir. 1966); Alire v. United States, 339 F.2d 702 (10th Cir. 1964); Young v. United States, 337 F.2d 753 (5th Cir. 1964); United States v. Garguilo, 324 F.2d 795 (2nd Cir. 1963); Ansourian v. United States, 240 F. Supp. 864 (S.D.N.Y. 1965), cert. den. 86 S.Ct. 1208, 383 U.S. 949, 16 L.Ed. 2d 212; United States v. Morgan, 39 F.R.D. 323 (N.D.Miss. 1966); Berg v. United States, 176 F.2d 122 (9th Cir. 1949), cert. den. 70 S.Ct. 137, 338 U.S. 876, 94 L.Ed. 537; Kiger v. United States, 315 F.2d 778 (7th Cir. 1963), cert. den. 375 U.S. 924, 11 L.Ed. 2d 166, 84 S.Ct. 270; Moon v. United States, supra; Bateman v. United States, 277 F.2d 65 (8th Cir. 1960). Petitioner does not view this test and his attendant burden of proof lightly. However, he intends

to demonstrate infra that the circumstances surrounding his indictment, trial, conviction, and sentence are extraordinary in the extreme, and that he is clearly entitled to this extraordinary remedy. Following are but a few factors which petitioner shall aver, demonstrate, and document to meet this admittedly heavy burden:

- that the grand jury that indicted him was fatally defective, and in fact, so empanelled as to assure his indictment and for no other purpose;
- that the prosecutors committed a number of unethical and/or illegal acts;
- that defense counsel was either hopelessly incompetent or disloyal;
- that there were blatant conflicts of interest which should have caused several of the prosecutors to disqualify themselves;
- that there was a wilful withholding of exculpatory evidence which, incidentally, continues to this very day;
- that the grand jury and the trial proceedings were fatally infected with perjurious testimony which was known to the prosecution to be perjurious;
- that there was selective prosecution in this case; and
- that the trial judge was biased and to the point where he should have recused himself from the case.

C. Jurisdiction of Court

The Federal District Court for the Southern District of New York is the proper forum for the filing of this petition for writ of error coram nobis because such a writ can issue, if at all, only from the court in which the conviction was had.

United States v. Morgan, supra, Davis v. Packard, 8 Pet. 312; Strang v. United States, supra; Gordon v. United States, 216 F.2d 495 (5th Cir. 1954); United States ex rel Dunkle v. Cavell, 151 F.Supp. 675 (D.Pa. 1957); Madigan v. Wells, 224 F.2d 577 (9th Cir. 1955), cert. den. 76 S.Ct. 700, 351 U.S. 911, 100 L.Ed. 1446; Pyles v. Boles, 250 F.Supp. 285 (D.W.Va. 1966); United States v. Cameron, 204 F.Supp. 915 (D.Tex. 1962), affirmed 311 F.2d 223; People v. McCullough, 300 N.Y. 107, 89 N.E. 2d 335 (1949), cert. den. 339 U.S. 924, 94 L.Ed. 1346, 70 S.Ct. 615 (defendant attempted in New York state Court to challenge validity of conviction in Federal District Court in Ohio.)

D. United States a Proper Party

Under modern practice in federal courts, the proper party to a coram nobis proceeding to set aside a federal criminal conviction is not the prosecuting attorney but rather the United States. United States ex rel Bogish v. Tees, 211 F.2d 69 (3rd Cir. 1954).

E. Inapplicability of Rule 12(b) F.R. Criminal Procedure

Rule 12(b)(2) of the Federal Rules of Criminal Procedure (F.R.Cr.P.) provides:

> (2) Defenses and Objections Which Must Be Raised. Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding. [Emphasis added.]

Part V of this petition details the manner in which the grand jury was manipulated into returning a true bill by the illegal selection of the foreman of the grand jury and the conscious use of perjured testimony on the part of the prosecution. Unfortunately, the facts regarding these matters became known to petitioner only after his trial had been completed. His failure and that of his counsel to discover these facts and enter a timely pre-trial objection to the indictment cannot be blamed on lack of diligence. As to the grand jury's illegality, the facts came out several years later in a chance and revealing interview given by the foreman of the grand jury to a newsman; without this voluntary "confession" only a clairvoyant could have suspected that the grand jury had been grossly manipulated as it was in this case. As to the perjurious testimony of Stuart Allen given before the grand jury in this case, the fact of the perjury became known only much later through discovery proceedings in the Merritt-Chapman and Scott case.

Further, in Part VII hereof, petitioner will point out evidence of gross negligence and/or disloyalty on the part of defense counsel. This, too, prevented petitioner from raising certain objections and defenses prior to his plea. This was petitioner's first involvement in a complicated criminal case, and he was forced by circumstances to rely on the advice of his counsel.

For these reasons, petitioner believes that he falls within that language of Rule 12(b)(2), F.R.C.P., that grants relief from the waiver "for cause shown."

F. Sentence Completed

Relief in the nature of a writ of error coram nobis can, for appropriate reasons, be invoked to review a sentence which a petitioner has not yet started to serve, since such relief, if it

is available at all, is allowable without limitation of time. Moon v. United States, supra. Equally, coram nobis is available to test the validity of sentences completely served. United States v. Carlino, 400 F.2d 56 (2nd Cir. 1968), cert. den. 89 S.Ct. 1630, 394 U.S. 1013, 23 L.Ed. 2d 39; United States v. Forlano, 319 F.2d 617 (2nd Cir. 1963), 249 F.Supp. 174 (S.D.N.Y. 1965), affirmed 355 F.2d 934 (1966); United States v. Malinksky, supra, United States v. Russo, 358 F.Supp. 436 (D.N.J. 1973); Haywood v. United States, 127 F.Supp. 485 (S.D.N.Y. 1954); United States v. Johnson, 269 F.Supp 767 (S.D.N.Y. 1967); Azzone v. United States, 341 F.2d 417 (8th Cir. 1965), cert. den. 85 S.Ct. 1782, 381 U.S. 943, 14 L.Ed. 2d 706; United States v. Morgan (Miss.), supra, Morgan v. United States, 396 F.2d 110 (2nd Cir. 1968), on remand 295 F.Supp. 967; Ward v. United States, 381 F.2d 14 (10th Cir. 1967); Holloway v. United States, 393 F.2d 731 (9th Cir. 1968); United States v. Norman, 391 F.2d 212 (6th Cir. 1968), cert. den. 88 S.Ct. 1265, 390 U.S. 1014, 20 L.Ed. 2d 163; Henrie v. Derryberry, 358 F.Supp. 719 (D. Okla. 1973); United States v. Sullivan, 278 F.Supp. 626 (D. Hawaii 1968). Although petitioner Wolfson completed his sentence in 1970, the above cases indicate that the law is clear that this should be no bar to relief through coram nobis.

G. Timeliness of Motion for Writ

As petitioner Wolfson was convicted in 1967 and completed his sentence in 1970, it might be argued that laches might stand in the way of this present motion. However, there is ample authority for the proposition that a void judgment may be set aside by a writ of error coram nobis at any time; in some cases a delay of many years has been considered no bar to relief. United States v. Morgan, supra, (13 years; violation of right to counsel); United States v. Cariola, supra, (24 years; violation of due process

clause of Fifth Amendment); Haywood v. United States, supra, United States v. Di Martini, 118 F.Supp. 601 (S.D.N.Y. 1953); Farnsworth V. United States, 98 App. D.C. 59, 232 F.2d 59 (D.C. Cir. 1956), 62 A.L.R. 2d 423 (18 years; violation of right to counsel); State v. Lindsey, 231 Ind. 126, 106 N.E. 2d 230 (1952) (18 years; violation of right to counsel); People v. Richetti, 302 N.Y. 290, 97 N.E. 2d 908 (1951) (27 years; violation of right to counsel). Petitioner avers that under the above authorities his motion for a writ should not be barred by laches.

There is, however, a caveat to the above doctrine: there must be reasons for failure to seek appropriate earlier relief. United States v. Morgan, supra, Kiger v. United States, supra. In the instant case, petitioner served a jail sentence. He was also subject to three lengthy trials in the Merritt-Chapman and Scott case; the third trial ended on October 9, 1972. During this extended period of time, he was unable to track down many of the various leads which had to be followed in order to file a creditable writ of error coram nobis. Finally, when his evidence pointed to serious irregularities on the part of the court, the prosecution and defense counsel, petitioner had difficulty in obtaining counsel willing to draw up and file this writ. For all these reasons, petitioner believes that the caveat is fulfilled, and that he has a meritorious explanation for the delay in filing. Further, the Court should be tolerant in its treatment of timeliness because petitioner has served his sentence and paid his fine. He is trying to clear his name by proving that he was not legally convicted of a felony but illegally persecuted into jail. Justice itself, and equally important, the public's confidence in our system of justice, will be strengthened if this peti-

tioner is given an even-handed chance of proving his case. If he was, in fact, persecuted, he should have the chance to prove it and clear his name, even after passage of many years.

H. Errors of Fact, Not of Law

It is black letter law that coram nobis lies where there are mistakes of fact, not of law. Bronson v. Schulten, 104 U.S. 410, 26 L.Ed.797 (1881); State v. Miller, 161 Kan. 210, 166 P.2d 680 (1946), cert. den. 329 U.S. 749, 91 L.Ed.646. However, "fact" has been broadly construed, and mistakes of fact corrected by the writ have included mistakes of the court itself, as well as mistakes of fact in regard to process, notice, and pleading. (See citations in Coram Nobis #3, 18 Am. Jur. 2nd 455-456).

To cite just a few of the facts put in dispute by this petition, petitioner avers:

- it is a question of fact whether the Securities and Exchange Commission ("SEC"), his own brokers, or his own lawyers warned him about technicalities relating to the selling of stock by a "control person."
- it is a question of fact whether the foreman of the grand jury was a lifelong friend of both the U.S. Attorney and the prosecutor who handled the grand jury.
- it is a question of fact whether the chief government witness before the grand jury (Allen) and at the trial (Morley) gave perjured testimony.

I. Present Adverse Effec

For a petitioner to be afforded relief through coram nobis he must show a present adverse effect from his unconstitutional conviction. Mathis v. United States, 246 F.Supp. 116 (D.N.C. 1965); United States v. Gernie, 228 F.Supp. 329 (S.D.N.Y. 1964). The right of a defendant, if he succeeds in having his allegedly illegal conviction set aside, to then stand trial, and, if found not guilty, qualify for recovery of damages for unjust conviction, gives him sufficient standing to attack a former conviction by motion in nature of writ of error coram nobis. United States v. Di Martini, supra. The fact that subsequent convictions may carry heavier penalties because of an improper first conviction may be a circumstance which warrants the grant of a writ of error coram nobis. McFadden v. United States, 312 F.Supp. 820 (D.Mo.1970), affirmed 439 F.2d 285. District courts have jurisdiction to hear motions in nature of applications for writs of error coram nobis to vacate and set aside judgments and sentences of conviction, when petitioners are outside the ambit of habeas corpus provisions which, by their own language, are limited to prisoners "in custody" and where motions go further and seek repayment of fines paid pursuant to sentences imposed and in effect amount to suits brought against the Government for money judgments. United States v. Lewis, 342 F.Supp. 833 (D.La. 1972), affirmed 478 F.2d 835.

Petitioner in this case continues to suffer serious adverse effects. First and foremost, his thriving business career has been damaged by his unconstitutional conviction. Honesty and integrity are keystones to a career in business; and petitioner's reputation as to both have been under a cloud since his conviction. Further, if retried and found innocent, or if the charges against him are dismissed or withdrawn, he is entitled to recover the

exorbitant $100,000 fine which was levied against him. Further, his right to vote, to hold certain public offices, and to serve on jury are curtailed by his wrongful conviction. Further his testimony in a judicial proceeding is suspect.

J. Totality of Circumstances

In subsection E, supra, the question of waiver of constitutional rights was discussed. A related subject is the consideration of the "totality of the circumstances."

In Ray v. Rose, 491 F.2d 285, 290 (1974), the Sixth Circuit said:

> "Waivers of constitutional rights are not lightly to be found. All of the surrounding circumstances should be examined to determine whether the waiver was in fact the product of improper coercion or inducement. Cf. Haynes v. Washington, 373 U.S. 503 (1963); Boykin v. Alabama, supra. Moreover, the role of competent counsel is crucial in advising the defendant of the nature of the charges and the defenses available to him..."

This was an echo of the Supreme Court's pronouncement in Brady v. United States, 397 U.S. 742, 749 (1970), that "the voluntariness of Brady's plea can be determined only by considering all of the relevant circumstances surrounding it." Other constitutional violations and waivers thereof may also be determined only with reference to the "totality of circumstances." Thus, the Supreme Court has held that "a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it." Stovall v. Denno, 388 U.S. 293, 302 (1967). The Sixth Circuit has applied it to effective counsel. Stidham v. Wingo, 452 F.2d 837 (1971).

In the present case, the Court is asked to view the "totality of the circumstances" in weighing both the question of waiver rights and the merits of the case as a whole. All of the circumstances surrounding the indictment, trial, conviction and sentence of petitioner should, in his view, be considered in weighing whether he intelligently waived his constitutional rights; and in

weighing whether he is entitled to a dismissal of charges or to a new trial.

K. Civil or Criminal Nature of Writ of Error Coram Nobis

A writ of error coram nobis filed in a criminal case is a step in the criminal case and not the beginning of a separate civil proceeding, as is the case in habeas corpus. United States v. Morgan, supra; Peterson v. State of Missouri, 355 F.Supp. 1371 (D.Mo. 1973). Yet, when it comes to procedures, the coram nobis proceeding is regarded essentially as civil in nature. Ex parte Wilson, 275 Ala. 439, 155 So.2d 611 (1963); People v. Paiva, 31 Cal. 2d 503, 190 P.2d 604 (1948); State ex rel Cutsinger v. Spencer, 219 Ind. 148, 41 N.E. 2d 601 (1941); State v. Miller, supra; Commonwealth v. Sirles, 267 S.W. 2d 66 (Ky. 1953); Duncan v. Robbins, 159 Me. 339, 193 A.2d 362 (1963); State v. Smith, 324 S.W. 2d 707 (Mo. 1959); State v. Cerny, 365 Mo. 732, 286 S.W. 2d 804 (1956); Hawk v. State, 151 Neb. 717, 39 N.W. 2d 561 (1949), cert. den. 339 U.S. 923, 94 L.Ed. 1346, 70 S.Ct. 612; Dobie v. Commonwealth, 198 Va. 702, 96 S.E. 2d 747 (1957).

Rule 35, F.R.Cr.P., allowing correction of an illegal sentence "at any time" is inapplicable to coram nobis, since sentences under that rule are those that the judgment of conviction did not permit. United States v. Morgan, supra. Conversely, Rule 60(b) F.R.C.P., which abolishes coram nobis in civil cases, is inapplicable to a criminal case because coram nobis in a criminal case is not the beginning of a new civil suit. United States v. Morgan, supra. Coram nobis is available in a criminal case as a result of the "All Writs Statute", 28 U.S.C. 1651, though such writs were abolished for use in civil cases by Rule 60(b) of the Federal Rules of Civil Procedure. United States v. Marcello, 210 F.Supp. 892 (E.D. La. 1962), affirmed 328 F.2d 961 (5th Cir. 1964).

Since coram nobis is neither strictly criminal nor strictly civil, the court might be well advised to do what is common in habeas corpus proceedings, i.e., fashion the rules of procedure to fit the circumstances of the case and to meet the ends of justice. (See Ray v. Rose, 491 F.2d 285 (6th Cir. 1974). This will allow a limited right to discovery and some relaxation of the hearsay rule.

L. Right to an Evidentiary Hearing

In the instant case, petitioner has alleged facts which, if established, would justify coram nobis relief; he has verified his petition and accompanied it with numerous supporting affidavits and other documentary proof; thus, he is entitled under the circumstances to an evidentiary hearing thereon. United States v. Keogh, supra; United States v. Carlino, supra; United States v. Capsopa, 260 F.2d 566 (2nd Cir. 1958); United States v. Tribote, 297 F.2d 598 (2nd Cir. 1961); Holloway v. United States, supra; United States v. Strother, 434 E2d 1292 (5th Cir. 1970); Waller v. United States, 432 F.2d 560 (5th Cir. 1970); Lujan v. United States, 424 F.2d 1053 (5th Cir. 1970), cert. den. 91 S.Ct. 474, 400 U.S. 997, 27 L.Ed. 2d 447.

M. Assignment to Judge Other than Trial Judge

This petition for a writ of error coram nobis is addressed to the Chief Judge of the United States District Court for the Southern District of New York, and, as part of the relief sought, it is urged that the petition be assigned to a judge other than Judge Palmieri, the trial judge.

There is authority for the proposition that, under normal circumstances, the trial judge should pass upon the allowance of the writ, as was the custom at common law. Ernst v. State, 181 Wis. 155, 193 N.W. 978 (1923); Annotation, 161 A.L.R. 541;

Elliott v. Commonwealth, 292 Ky. 614, 167 S.W. 2d 703 (1942). However, there is a parallel doctrine that another judge shall be assigned for good cause shown. United States v. Halley, 240 F.2d 418 (2nd Cir. 1957), cert. den. 353 U.S. 967, 1 L.Ed. 2d 917, 77 S.Ct. 1052; People v. Carpus, 2 App. Div. 2d 653, 152 N.Y. S.2d 27 (1956). This doctrine is particularly applicable either when the trial judge's actions form a basis for the petition, People v. Amoroso, 8 App. Div. 2d 683, 184 N.Y.S.2d 383 (1959), and/or when the trial judge is likely to be called as a material witness. United States v. Halley, supra; United States v. Valentino, 283 F.2d 634 (2nd Cir. 1960).

In the instant case there are allegations, which are supported by a verified petition and various affidavits, that the trial judge acted prejudicially with respect to the grand jury, the trial, and the sentencing of petitioner. There is a likelihood that it will be necessary to call him as a material witness. Therefore, petitioner prays that the Chief Judge will assign the petition to another judge of the District bench.

Scope of Relief

Generally, the only remedy available under a writ of error coram nobis is the grant of a new trial to correct the deficiencies of the first trial. If successful, the defendant is thus placed in the same position as he was before the judgment of conviction was entered. And, if that is the only relief to which the Court believes petitioner is entitled, he will be grateful to the Court.

However, the nature of the writ is such that it is to be treated as an emergency measure, born of necessity to afford a defendant a remedy against injustice, when no other avenue of judicial relief is, or ever was, available to him. This Court

has authority under the "All Writs Statute" 28 U.S.C. 1651(a) to issue all writs necessary or appropriate in aid of its respective jurisdiction and agreeable to the usages and principles of law.

Justice at least being a relative and not an absolute matter, the Court should attempt to fashion a remedy which most closely approximates justice under all of the circumstances. In petitioner's view, the Court, after reviewing this application for a writ of error coram nobis, should grant certain motions in the nature of discovery (see below) and then schedule an evidentiary hearing to review the validity of the entire prosecution (indictment, trial, conviction, and sentence) and, satisfied that they were invalid from start to finish, issue a writ and order, couched in appropriate form and language to clear petitioner of the criminal charges of which he was charged and convicted.

Another reason why a new trial might not comport with justice is that the passage of time has rendered a fair trial extremely difficult. The major prosecution witness, John Morley, died several years ago. The next most important prosecution witness, John Duncan, is aged and in bad health. The principal document sought by the defense (the transcript of a 1952 formal interview of defendant Wolfson by the S.E.C.) has never been produced by the S.E.C. and, according to that agency, it is "lost", despite their statutory requirement to retain copies of such documents permanently.

PART IV

INTERRELATION BETWEEN THE CONTINENTAL AND MERRITT CASES

This petition for a writ of error coram nobis is addressed to petitioner's conviction in the case of United States v. Wolfson, 269 F.Supp. 621 (S.D.N.Y. 1967), affirmed 405 F.2d 779, (2nd Cir. 1968), and 29 F.Supp. 881, affirmed 413 F.2d 804 (2nd Cir. 1968). Petitioner was indicted on nineteen counts of violating 15 U.S.C. 77e(a) and one count of violating 18 U.S.C. 371. He was found guilty on all counts, fined the maximum of $100,000 and sentenced to one year in jail. This case is generally referred to as the "Continental Case."

However, in this petition and accompanying and supporting documents, petitioner will from time to time make reference to the case of United States v. Wolfson, et al., 282 F.Supp. 772 (S.D.N.Y. 1967), 437 F.2d 862, 289 F.Supp. 903. The latter case is generally known as the Merritt-Chapman and Scott Case (referred to below as the "Merritt Case"). Petitioner was indicted for violating the securities laws in relation to the sale of stock of the Merritt-Chapman and Scott Corporation, of which petitioner was Chairman of the Board. He was tried three times. The jury at the first trial found him guilty but the conviction was overturned upon appeal; the second and third trials resulted in hung juries. To avoid an unprecedented fourth trial, petitioner pleaded nolo contendere to a misdemeanor and was fined but not sentenced further to jail.

It is necessary to mention the Merritt Case from time to time because it is inextricably bound to the Continental Case in many fundamental ways:

- The same grand jury handed down both indictments; in fact, as far as the grand jury was concerned, the Continental indictment was essentially a

"spin-off" from the Merritt Case, even though it was handed down earlier than the Merritt indictment;

- Petitioner Wolfson (and his co-defendant Gerbert_ were defendants in both cases;
- Judge Palmieri presided over the Continental trial and refused to recuse himself for the first Merritt trial;
- Essentially the same prosecutorial staff was involved in both cases;
- The same U.S. Attorney was involved in both cases;
- The same brokerage firms were critically involved in both cases; and
- Many of the same key documents were involved in both cases.

Since petitioner claims that he was convicted as a result of a prosecutorial persecution rather than a legal prosecution, the cases are inseparable. However, the Merritt Case is referred to in this petition only when it is essential to do so in order to demonstrate the pattern of misbehavior and unconstitutional treatment involved in the instant Continental Case.

PART V

GRAND JURY

A. Basic Purpose of Grand Jury

The grand jury has traditionally been considered to be the primary bulwark of the innocent against hasty, malicious and oppressive prosecution and persecution. United States v. Bailey, 322 F.Supp. 1351 (D.Ill. 1971). Furthermore, it serves the valuable function of standing between accuser and accused to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will. Wood v. Georgia, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962).

B. Presumption

There is a presumption that the jury was selected and drawn according to law. Kie v. United States, 27 F.351 (C.C. Oregon 1886); Beatrice Foods Co. v. United States, 312 F.2d 29 (8th Cir. 1963), cert. den. 83 S.Ct. 1289, 373 U.S. 904, 10 L.Ed. 2d 199 However, this presumption is rebuttable. United States v. Fujimoto, 107 F.Supp. 865 (D. Hawaii 1952); Beatrice Food Co. v. United States, supra.

C. Timeliness

The defendant in a criminal case must take the first opportunity in his power to make objection to irregularity in selecting and empanelling the grand jury by which he was indicted. Agnew v. United States, 165 U.S. 36 (1897); United States v. West Coast News Co., 216 F.Supp. 911 (D.Mich. 1963). However, the first knowledge that petitioner Wolfson had as to the key elements in the improper empanelling of the grand jury in his case was not only after arraignment, indictment, and conviction, but also after he had served his sentence. In his case, post-conviction and post-sentence are as timely as possible, and the ends of justice require that his objection not be overruled on a technicality relating to timeliness.

D. Unbiased Grand Jury

There is a constitutional right to an unbiased and uninflamed grand jury. Wood v. Georgia, supra. [See Appeal in Continental Case, 405 F.2d 779 (2nd Cir. 1968).] Grand jurors should be impartial and they may be excluded in cases where bias can be shown. See, for example, United States v. Griffith, 55 App. D.C. 123, 2 F.2d 925 (D.C. Cir. 1924), where an employee of the United States was not qualified to serve as a member of a grand jury in the District of Columbia. Friendship of a juror

with either a prospective defendant or a prosecutor raises a substantial question of bias; courts have been divided on the proper way to handle such cases. In Lane v. United States, 321 F.2d 573 (5th Cir. 1963), the Court held that the fact that jurors were friends of the U.S. Attorney did not necessarily disqualify them as jurors, where they testified that that friendship would not influence them. In Roberson v. United States, 249 F.2d 737 (5th Cir. 1957), cert. den. 356 U.S. 919, the Court held that a juror is not per se disqualified because he is acquainted with, or a friend of, counsel in the case, whether such a counsel be advocating the cause of a private litigant or prosecuting a criminal case. See also United States v. Reed, 27 F. Cas. 722 (no. 16, 134) (C.C.N.Y. 1852), and United States v. Smyth, 104 F.Supp. 283 (D. Cal. 1952). However, in the instant case, the foreman of the grand jury, William McRitchie, was not only a friend for years of the United States Attorney, Robert Morgenthau, and his father before him, but also a life-long and intimate friend of the prosecuting attorney, Michael Armstrong. Under the tests laid down in the above-cited authorities, it is clear that McRitchie should not have been the grand jury foreman.

E. Importance of Foreman

Because of the key role of the grand jury foreman, it is especially important that he be unbiased. An indictment should not be quashed because of alleged undue influence of foreman of grand jury in procuring indictment unless undue influence is shown. United States v. Remington, 191 F.2d 246 (2nd Cir. 1951), cert. den. 72 S.Ct. 580, 343 U.S. 907 (emphasis added).

F. Was Foreman McRitchie Unbiased?

By his own post-trial admission, Foreman McRitchie had known the chief prosecutor in this case, Michael Armstrong, from childhood. McRitchie's oldest son had even attended school with Armstrong over a period of years.

McRitchie, not only had known the U.S. Attorney for the Southern District, Robert Morgenthau, for many years, he had also known his father, Henry Morgenthau.

McRitchie admitted knowing Judge Palmieri "slightly" when he was put on the grand jury wheel and called as a grand juror. However, he did not know him well, as in the case of Morgenthau, or intimately, as in the case of Armstrong.

McRitchie has said that he was "concerned" when Michael Armstrong walked in the jury room to present the Wolfson cases. His concern led him to go hurriedly to see his friend, Morgenthau, to whom he explained the situation. According to McRitchie, Morgenthau said that he did not think his intimate friendship with prosecutor Armstrong was "justification for my being relieved." McRitchie continued to serve as foreman until the Wolfson indictments were handed down and the jury was dismissed.

Another strange aspect to the case is that McRitchie is not only a banker, but also a lawyer, being (or having been) a member of the bars of both Florida and Georgia. Although lawyers are not necessarily barred from serving on juries, it is considered good practice to disqualify them. It is not known in this case whether McRitchie made his status as a lawyer known to anyone connected with the case. It is hoped that this matter can be clarified at an evidentiary hearing.

Additionally, McRitchie had been employed by the Morgan Guaranty Bank (and its predecessor) for almost forty years when he served as foreman on the Wolfson grand jury. As an official of Morgan, McRitchie may well have had a conflict of interest

with respect to Wolfson. Whether his selection as foreman of the grand jury by the trial judge was purely accidental is another matter which, hopefully, can be clarified at an evidentiary hearing.

Petitioner here asserts that the most important member of the grand jury, the foreman, was, because of his friendships and his background, hopelessly biased against petitioner, to petitioner's extreme prejudice. He contends that this alone has made the actions of the grand jury null and void. With McRitchie as foreman, there was no way in which he could have been accorded his constitutional rights before the grand jury.

G. How did McRitchie Get on the Wolfson Grand Jury?

McRitchie says that his name was put in the box when his Bank Chairman, Mr.Luther Cleveland, was retiring and asked "the judge" to be excused. "The judge" agreed, on the ground that Mr. Cleveland would give him a couple of other names. McRitchie was a "volunteer." Petitioner is not sure at this time of the identify of "the judge", but from the tenor of McRitchie's admission, he believes it to be Judge Palmieri.

Prior to 1968 the courts were divided on the question of of the proper use, if any, of "key men" in the selection of grand juries. [Compare United States v. Hoffa, 205 F.Supp. 710 (D. Fla. 1962), cert. den. 83 S.Ct. 188, 371 U.S. 892, and United States v. Tillman, 272 F.Supp. 908 (D. Ga. 1967).] However, no reported case has been found wherein a federal judge, as opposed to other leading citizens, acted as a "key man." It is petitioner's contention that, regardless of general views as to the use of "key men", this role of "key man" being played by a federal judge is against sound judicial tradition and a serious impropriety which worked greatly to petitioner's prejudice.

H. Judge Palmieri's Role

To the best of petitioner's knowledge and belief, trial Judge Palmieri performed the following tasks:

- either directly or indirectly, he chose McRitchie for the grand jury wheel;
- he empanelled the grand jury which indicted petitioner;
- he selected McRitchie as the foreman of the grand jury which indicted petitioner.
- he presided not only over the Continental Case but also over the Merritt-Chapman and Scott Case; these were the only two indictments handed down by the grand jury in question, and Wolfson was indicted in both cases.

This raises a number of fascinating questions. Out of more than twenty Federal District judges in the Southern District of New York in 1966, how is it that Judge Palmieri empanelled this particular jury? Did he traditionally empanel grand juries for "S.E.C. matters" in the District? Did he normally act as trial judge on cases that arose out of indictments handed down by "his" grand juries? Did he get the Continental and Merritt Cases by rotation or special assignment and, if the latter, why? Did he see that McRitchie was selected for grand juries in S.E.C. and similar related matters? Did he select McRitchie as foreman in more than one of these cases?

I. Prosecutorial Zeal

To the best of petitioner's knowledge and belief, the grand jury that indicted him was called for the sole purpose of handling the "Wolfson matters" and after handing down indictments in these matters it was immediately discharged. This, in peti-

tioner's view, indicates that the Government had an unusual interest in one man and essentially one matter. Why a special grand jury for him? Was he on someone's "enemies list"?

Apparently, grand jury witnesses were flown into New York from all over the country. Nothing was too much trouble or too expensive.

And yet the chief witness before the grand jury was Stuart Allen, an S.E.C. employee whose grand jury testimony was disputed or negated by a whole series of Government witnesses at the trial. Should not prosecutor Armstrong have known that Stuart Allen's grand jury testimony was false and probably perjurious? Had not he interviewed many of the conflicting witnesses who, incidentally, he called at the trial? These questions, too, can be answered at an evidentiary hearing.

J. Formal Vote by Members of Grand Jury

Although foreman McRitchie has said that a majority of the members of the grand jury approved a true bill in this case, there is some question whether the actual indictment, which was drafted by prosecutor Armstrong, was actually submitted to members of the grand jury and voted upon affirmatively by 12 or more members. In Gaither v. United States, 413 F.2d 1061 (D.C. Cir. 1969), indictments were dismissed because they had not been physically and formally submitted to the grand jury for a vote, but simply approved by the foreman on behalf of the jury.

K. Discovery as to Grand Jury

Petitioner requests (motions attached) the Court to issue an order giving petitioner the right to see the following items:

1) the grand jury minutes in order to determine (a) if a formal vote was taken as to the indictment in this case and, if so, what the vote was; and (b) the effect upon the grand jury of the friendship of McRitchie with Armstrong and Morgenthau.

2) a list of the names, addresses, and professions of all members of the grand jury to determine to what extent the grand jury was a "Blue Ribbon" grand jury. How many stock brokers? How many bankers? How many lawyers?

Petitioner also seeks to address certain interrogatories to McRitchie to confirm in detail the content of this Part of the Writ. (Motion attached hereto).

PART VI

PROSECUTORIAL MISCONDUCT

As Justice Frankfurter once said in a famous dissent:

> This Court has rejected the notion that because a conviction is established on incontestable proof of guilt it may stand, no matter how the proof was secured. Observance of due process has to do not with questions of guilt or innocence but the mode by which guilt is ascertained... [W]hen a conviction is secured by methods which offend elementary standards of justice, the victim of such methods may invoke the Fourteenth Amendment because that Amendment guarantees him a trial fundamentally fair... Irvine v. California, 347 U.S. 128, 148.

Chief Judge Bazelon of the Court of Appeals for the District of Columbia made the following observation in 1967:

> The rationale of these cases [concerning knowing use of perjured testimony] seems to have been that convictions must not be obtained through prosecutorial misconduct which violates civilized notions of fairness and thereby taints the entire criminal process. Lawless law enforcement should not be tolerated. Levin v. Clark, 133 U.S. App. D.C. 6, 8; 408 F.2d 1209, 1211.

And as Chief Judge Bazelon said more recently in one of the Watergate cases [United States v. McCord, No. 73-2252, decided Dec. 12, 1974, _____ F.2d _____, pp. 24-26 of slip opinon]:

> .... serious prosecutorial misconduct may so pollute a criminal prosecution as to require dismissal of the indictment or a new trial, without regard to prejudice to the accused. Few cases present the proposition in as bald a form as we have here; generally prosecutorial misconduct is reducible to certain specific errrors which arguably may have prejudiced the defendant. Thus, courts have ordered new trials when the prosecution has knowingly used perjured testimony.
>
> Levin v. Clark, 133 U.S. App. D.C. 6, 8, 408 F.2d 1209, 1211 (1967) (Bazelon, C.J.); See Mesarosh v. United States, 352 U.S. 1, 14 (1956); Mooney v. Holohan, 294 U.S. 103, 112-13 (1935); Levin v. Katzenbach, 124 U.S. App. D.C. 158, 165, 363 F.2d 287, 294 (1966) (Burger,JJ); Coggins v. O'Brien, 188 F.2d 130, 139 (1st Cir. 1951) (Magruder, C.J. concurring); Note The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant, 74 Yale L.J. 136, 138-40 (1964). See also United States v. Pearson, 488 F.2d 1207, 1217 (5th Cir. 1971) (prosecutorial misconduct in systematically excluding Negroes from juries by exercise of pre-emptory challenges); cases cited and discussed Vess, Walking a Tightrope; A Survey of Limitations on the Prosecutor's Closing Argument, 64 J. Crim. L. & Criminology. 22 (1973); Alschuler, Courtroom Misconduct by Prosecutors and Trial Judges, 50 Texas L. Review 629 (1972)

have reversed convictions when the atmosphere surrounding trial suggests intimidation or reckless disregard of the postulates of a fair trial,

> [Cf. Irvine v. Calif., 347 U.S. 144-49 (1954) (Franfurter, J. Dissenting); Rochin v. Calif., 342 U.S. 165 (1952); Powell v. Alabama, 287 U.S. 45 (1932); Mooney v. Holohan, 294 U.S. 103 (1935) Brown v. Mississippi, 297 U.S. 278 (1936)]

have excluded evidence seized pursuant to unlawful searches partially because of lawless conduct represented by that search,

> [See authorities collected in U.S. v. Calandra, 414 U.S. 338, 356-66 (1974) Brennan J., dissenting); Olmstead v. U.S., 277 U.S. 438, 469-85 (1928) (Holmes & Brandeis, JJ, dissenting)]

and finally have dismissed indictments where the defendant was entrapped by lawless conduct of police officers.

> [See authorities collected in U.S. v. Russell, 411 U.S. 423, 436-50 (1973) Douglas, Marshall, Stewart & Brennan, JJ, dissenting)]

While the principle has found expression in these situations, we see nothing that limits it to such situations: "There is no body of precedents by which we are bound and which confines us to logical deduction from established rules. Therefore we must consider the two objects of desire both of which we cannot have and make up our minds which to choose. It is desirable that criminals should be detected. ...It is also desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the [conviction] is to be obtained."

> [Olmstead v. U.S., 277 U.S. 438, 470 (1928) (Holmes J, dissenting)].

This principle is not strictly limited to situations in which the defendant has suffered arguable prejudice by reason of the prosecutorial conduct. This is so because the principle is not one of fairness to the defendant alone but rather, in Justice Brandeis' words, is one designed to "maintain respect for law ....to promote confidence in the administration of justice;... to preserve the judicial process from contamination... Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its

> example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal laws the end justifies the means - to declare that the Government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution."
>
> [Id. at 484-85 (Brandeis, J. dissenting).]
>
> While this rationale for the principle excludes the strict requirement of proof or prejudice, it does not eliminate consideration of prejudice altogether.

Petitioner Wolfson's prosecution in the Continental case is laced with serious incidents or prosecutorial misconduct which seriously prejudiced his right to a fair trial. Unfortunately, (from petitioner's standpoint) many of these are not capable of documentation or other proof and, therefore, must be eliminated. Some demonstrable, prejudicial examples follow.

A. Perjury

The use of perjured testimony in this case was widespread. However, because of the complex nature of the explanations dealing with the perjured testimony, it is considered separately in Part IX infra. Suffice it to say at this point, that the perjured testimony was central to the case, well known to the prosecution, and highly prejudicial to petitioner.

B. Witnesses Threatened

Mr. George B. Green, a New York broker, residing at One Christopher Street, New York, New York, was a grand jury witness and a prospective trial witness. As his affidavit of February 12, 1975, [Attached as Exhibit VI(A)] attests, he was intimidated and threatened by a series of officials in the office of the United States Attorney and of the S.E.C. He was threatened on numerous

occasions with jail and a loss of his employment because his testimony did not accord with the Government's point of view. He was openly threatened because he would not confer with the prosecutors except under subpoena and with a court reporter present. Ultimately, one of the prosecutors, Mr. Galvani, did telephone his employer, a senior partner in a brokerage firm subject to S.E.C. regulation. The upshot of the whole matter was that Mr. Green was summarily discharged. He had not only been threatened by the United States Government, but the threat was also executed.

Mr. Henry Steeger of the Plank Corporation of Appleton, Wisconsin, was a key witness at an evidentiary hearing in the Continental Case, which dealt with the authenticity of the most crucial document in the case, "Exhibit 21." Mr. Steeger was an expert in dandy rolls which are used in watermarking. He had been questioned by petitioner's attorneys and document experts and was prepared to testify for petitioner at the hearing.

As was perfectly proper, representatives of the United States Attorney and the S.E.C. went to Appleton to discuss the matter with Mr. Steeger. However, their actions there were similar to those used on Mr. Green. As a result, Mr. Steeger asked that Mr. Austin Mittler, one of petitioner's attorneys, be present at further sessions. This incensed one of the prosecutors, Mr. Paul Grand, who then threatened and intimidated both Mr. Steeger and Mr. Mittler. One of the Government representatives went to Mr. Steeger's employer, Mr. Plank, and tried to get Mr. Plank to have Steeger not use Mittler as an attorney. It is not known if they attempted to get Mr. Plank to discharge Mr. Steeger; in any event, he was a lifetime employee and was not fired. [See attached Affidavit of Austin Mittler, dated February 11, 1972, and attached as Exhibit VI(B)].

C. Withholding of Material and Potentially Exculpatory Evidence

United States v. Keogh, 417 F.2d 885 (2nd Cir. 1969), stands for the proposition, inter alia, that, in a proceeding for a writ of error coram nobis, relief should be granted if material evidence is withheld by the prosecution which could have assisted the defendant when all the facts were developed, and if the evidence was not readily available to petitioner.

Although petitioner was indicted in 1966 and tried in 1967, the only evidence of his alleged wilfullness in selling unregistered stock in violation of Section 5 of the Securities Act of 1933 harked back to the years 1950-1952 when the S.E.C. was investigating the Capital Transit Co. (Washington, D.C.) in which petitioner and his family owned controlling interest. During the 1950-52 period, the S.E.C. conducted two investigations of Capital Transit, one labelled W525, the other W557. Related to these investigations, petitioner and one other person were interviewed on October 16, 1950, by Mr. E. Russel Kelly and, in part, by Mr. James J. Duncan, both S.E.C. officials. At a subsequent date, Mr. Kelly allegedly dictated or wrote an eight-page memorandum regarding the interview. This memorandum, which was trial Exhibit 21 and the authenticity of which was later challenged by petitioner, indicated that Mr. Kelly had explained to petitioner some of the current requirements of registration... though some sixteen years prior to indictment.

When "Exhibit 21" became the central issue at the Continental trial, and petitioner's guilt or innocence turned on something he was or was not told sixteen years earlier in the Capital Transit investigation, justice demanded that petitioner be permitted to see files W525 and W557. Capital Transit had gone out of business years ago. Showing him the files might have allowed him to prove his innocence, but they were withheld. Amazingly,

they are still being denied despite the "new" Freedom of Information Act of 1974. For years petitioner has attempted to obtain permission from the S.E.C. to see these old files. The most recent attempt began on May 23, 1974, when permission was sought under the Freedom of Information Act. When permission was once again denied, petitioner filed suit on Sept. 17, 1974. Once again, the S.E.C. resisted. However, with passage of amendments to the Freedom of Information Act in December, 1974, they were forced to grant that petitioner was entitled to see most of the files. Then, they said they could not produce the files because they were no longer in their possession, but with the U.S. Attorney in New York. Petitioner has yet to see the files. The correspondence and pleadings re this matter are reproduced as Exhibit VI(C) appended hereto.

Further, these files were withheld from Mr. Duncan when he testified at the trial as to the 1950 interview. Though he was a lifelong, but then retired, S.E.C. employee, he, too, was forbidden to refresh his memory by reviewing W525 and W557, even though he was largely responsible for putting the files together. [See Exhibit VI(B), which has included therein a Memorandum, dated December 10, 1970, by Mr. Austim Mittler re Duncan's inability to see these files.]

The only other time, aside from 1950, that petitioner gave evidence before the S.E.C. was on April 10, 1952; this testimony was given under oath and transcribed; and, under its Rules and Regulations, the S.E.C. is under an obligation to retain a copy thereof permanently. It was petitioner's belief that this 1952 formal questioning, when read in toto, would clearly show his ignorance of the technical details relating to registration. Yet, from 1966 to date, the S.E.C. has claimed that it does not have a copy of that transcript; they claim that the original and any

copies are all "lost." The S.E.C. also says that a copy was given to one of petitioner's lawyers years ago, which may or may not be correct; that attorney says that, if he had a copy, it was destroyed in a fire.

It is possible that the S.E.C. truly has lost the copy which it is bound to retain. However, two recent events cast doubts on this alleged loss. First, petitioner avers that Stuart Allen, the Chief S.E.C. Investigator in this case, has seen the 1952 transcript. Allen denies it. Yet, the Commission as a whole, after a formal decision, refused to ask Allen to sign a simple one-line affidavit, stating that he had in fact never seen the transcript. [See Documents in Exhibit VI(D).] Second, as late as October 22, 1974, Mr. Tom Huston, Supervisor of the S.E.C. File Room, 1100 L. St., N.W., Washington, D.C., stated to an agent of petitioner that the transcript does indeed exists but is being withheld as a "non-public document." [See Affidavit of Kennard Smith, dated Nov. 21, 1974, Exhibit VI(E).]

If the document exists, petitioner believes that he is entitled to see it. In this respect he wishes to examine Messrs. Allen and Horton under oath at an evidentiary hearing.

D. Deliberate Misleading of Jury

Throughout the whole trial, prosecutor Armstrong deliberately misled the jury into believing that petitioner Wolfson had somehow flim-flammed his way out of a criminal charge regarding his failure to register in connection with the S.E.C. investigation of Capital Transit... and that 'they should not let it happen again.' Yet Armstrong knew full well, indeed intimately, that petitioner was in no way a defendant or prospective defendant in the Capital Transit matter. Although others had sold some stocks, petitioner Wolfson had sold no Capital Transit stock

whatsoever, registered or otherwise, and he was at the meeting with Kelly because he had a controlling interest in the corporation. Armstrong deliberate misled the jury and, in petitioner's view, this contributed heavily to their decision to find him guilty.

E. General

Petitioner realizes only too well that he is making the most serious charges against the ethical conduct of the staff of the S.E.C. and several prominent members of the "S.E.C. bar." Although he has supported these charges with factual evidence, he realizes that the Court may have great difficulty in giving credence to them. Therefore, petitioner wishes to draw the Court's attention to a running debate in the New York securities-law community in 1974. [See especially articles in the New York Law Journal of May 14, 1974, and June 12, 1974.]

The "debate" was begun by a speech delivered by Dean Monroe Freedman of Hofstra Law School to several professional groups in January and May of 1974. The speech/article was entitled "A Civil Libertarian Looks at Securities Regulation."

Among other things, Dean Freedman leveled the following charges:

- The securities Bar has abdicated its responsibilities to its clients in deference to the Commission.
- S.E.C. Commissioners say that the task of enforcing the securities law rests in overwhelming measure on the Bar's shoulders.
- The S.E.C. relies heavily on private spies and informers.
- The S.E.C. depends upon intimidation of individuals, business firms, and attorneys through aggressive abuse of its power over the economic life and death of those subject to its jurisdiction.

- Despite a clear ethical rule to the contrary, it it is common for S.E.C. staff members to instruct witnesses not to discuss their testimony with counsel for respondents.
- A respondent may be subpoenaed without being given notice that he or she is a target of the investigation.
- When an attorney advises his client to invoke his constitutional privilege against self-incrimination, he may be advised that 'that's the best way to guarantee an indictment.'

The list is long and shocking. Unfortunately, most of the unethical practices charged against the S.E.C. were used, one way or another, against petitioner, as set forth in this petition. [The whole of Dean Freedman's address/article an unprinted rebuttal by the Dean to his critics, as well as a more recent article, "Bulls, Bears, Fat Cats and Consumerism", are reproduced as Exhibit VI(F). It should also be noted that at the time that petitioner's case was being tried, the U.S. Attorney's office in the Southern District was caught red-handed using false documents in a number of draft evasion prosecutions. Exhibit VI(G) contains the pertinent parts of two such cases, U.S. v. Fargas (66 Cr. 792) and U.S. v. Hudson (67 Cr. 681)].

PART VII

INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment to the United States Constitution provides in pertinent part that "In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense." The term "Assistance of Counsel" has long been held to mean effective assistance. Neufield v. United States, 73 App. D.C. 174, 118 F.2d 375 (D.C. Cir. 1941); Thomas v. District of Columbia, 67 App. D. C. 179, 90 F.2d 424 (D.C. Cir. 1937).

A violation of a criminal defendant's constitutional rights to be represented by counsel may constitute a ground for the granting of a writ of coram nobis. United States v. Morgan, 202 F.2d 67 (2nd Cir. 1953), affirmed 346 U.S. 502, 98 L.Ed. 248, 74 S.Ct. 247 (1954) State v. Lindsey, 231 Ind. 126, 106 N.E.2d 230 (1952) People v. Smith, 202 Misc. 694, 108 N.Y S.2d 703 (1951). The defects in effective assistance of counsel cognizable under coram nobis relief fall into the two broad categories of gross negligence and disloyalty. Farnsworth v. United States, supra.

The usual test for gross negligence has been that the ineptitude is so extensive as to indicate that the entire proceedings were a farce and a mockery of justice, resulting in a denial of due process. The leading case in the Second Circuit is United States v. Wight, 176 F.2d 376 (1949). See also United States v. Giarguilo, supra. United States ex rel. Cooper v. Reincke, 333 F.2d 608 (2nd Cir. 1964). United States ex. rel. Boucher v. Reincke, 341 F.2d 997 (2nd Cir. 1965). United States v. Miller, 254 F.2d 523 (2nd Cir. 1958). The subject was also recently reviewed at great length by the Sixth Circuit in Ray v. Rose, supra. See also People v. Kalmus, (Gen Sess) 123 N.Y.S.2d 411 (1953). People v. Codarre, 206 Misc. 950, 138 N.Y.S.2d 18 (1954), affirmed 285 App. Div. 1087, 140 N.Y.S.2d 289; People v. De Bernardo, 199 Misc. 563, 106 N.Y.S.2d 515 (1951), mod. on other grounds, 282 App. Div. 920, 125 N.Y.S.2d 641.

Equally, disloyalty or conflict of interest may, if substantial and proven, result in the denial of effective assistance of counsel in contravention of the Sixth Amendment. Glasser v. United States, 315 U.S. 60, 70 (1942). United States v. DeCoster, 487 F.2d 1197, 1203 (D.C. Cir. 1973). Ray v. Rose, supra.

The American Bar Association ("ABA") project on Standards for Criminal Justice, Standards Relating to the Defense Function (App. Draft 1971) may be consulted to determine standards of effective assistance of counsel. Standards 1.6 and 3.5 clearly prohibit disloyalty and conflict of interest. See also ABA Code of Professional Responsiblity, DR 4-101; DR 5-105; EC 7-9, 7-17; DR 7-101(A); H. Drinker, Legal Ethics 103-39 (1953). See also Dukes v. Warden, 406 U.S. 250 (1972); United States v. Bell, No. 72-1518 (D.C. Cir. Nov. 1, 1974) at 31-33 (slip opinion); Decker v. United States, 378 F.2d 245, 248-50 (6th Cir. 1967).

In order to assert an infirmity under this Constitutional Amendment, the circumstances must demonstrate that which amounts to a lawyer's deliberate abdication of his ethical duty to his client, Robinson v. United States, 448 F.2d 1255 (8th Cir. 1971), or that conduct on the part of the lawyer which is shocking to the conscience of the court. Odom v. United States, 377 F.2d 853 (5th Cir. 1967).

Effective assistance of counsel requires nothing less than the undivided loyalty of counsel to his client. United States ex. rel. Platts v. Myers, 253 F.Supp. 23 (D. Pa. 1966); Atilus v. United States, 406 F.2d 694 (5th Cir. 1969). Petitioner believes that the facts set forth infra show that his counsel either were grossly incompetent or abdicated their ethical duty or some of each. Whatever the cause, petitioner believes that he was clearly deprived of his constitutional right to the effective assistance of counsel.

It has long been held that anything short of the grossest kind of negligence by defense counsel will fall short of meeting the burden required to prove a sixth Amendment deprivation of

effective counsel; this is true generally but it is especially true with respect to habeas corpus and coram nobis proceedings. If it were mere negligence involved, even petitioner would concede that he cannot meet the burden; however, the negligence is gross, even if it does not reach the depths of "farce and mockery", and, when combined with the disloyal acts of counsel, the combination, in petitioner's view, amounts to ineffective assistance of counsel under the doctrine as now applied by the courts. It should be noted at this point that petitioner's defense was headed by Mr. Milton Gould of New York City, a well known member of the S.E.C. bar. Mr. Gould worked closely with Mr. Joseph M. Glickstein, Sr., of Jacksonville, Florida, who had been petitioner's personal attorney for many years, and who also was general counsel to many of the firms in which petitioner had an interest, including Continental Enterprises. [The Gould-Glickstein relationship is discussed more fully, infra.]

The Continental Case was an extremely complex one, both legally and factually. There was a twenty-count indictment regarding past sales of over-the-counter stock through a number of brokers. Most of the records in the matter were kept at corporation headquarters in Jacksonville, Florida. As with most corporations, the files were massive and detailed. Yet, the Chief Defense Counsel, Mr. Milton Gould of New York, never attempted to review these files, even hastily. He never even came to Jacksonville; rather, he sent two young associates who spent less than two days in their review of the files. Admittedly, this alone is not legally significant.

Yet, no one from the defense team even attempted to interview the chief government witness, Mr. John Morley, who had been the Wolfson family's chief broker for twenty years. When questioned

on this point before the trial, the defense lawyers said, in effect, "Oh we can't interview him; he's a prosecution witness." It is possible that he would not have talked with them, but there is no excuse for their not having even attempted an interview.

Defense counsel also failed to file the proper motions under Rule 16 F.R. Crim. Proc. for the production of defendant's prior statements to the S.E.C. This was an extremely important and crucial error because the prosecutor was able to convince the trial jury of petitioner's knowledge of registration requirements almost single-handedly by the introduction of a summary of the meeting of petitioner with the S.E.C. on October 16, 1950, the so-called Kelly letter and/or trial Exhibit 21. The prosecutor introduced it in conjunction with the testimony of a rebuttal witness, Mr. John Duncan, and they caught defense counsel completely by surprise. They had never heard of Exhibit 21 and were unable to effectively cross-examine Mr. Duncan and other witnesses or look into the authenticity of the document, which was later challenged unsuccessfully. Further, they did not move under Rule 16 for production of the transcript of the formal Wolfson-S.E.C. session of April 10, 1952, which has never been produced to this day.

Most important, the Chief Defense Counsel, Mr. Gould, had in his possession two very important letters which, if introduced attrial, would have greatly offset the government's attempts to show that petitioner's failure to register the Continental stock in question was knowledgeable and wilful. By way of background, the certificate of incorporation of Continental Enterprises,

Inc., was certified by the Secretary of State of Delaware on March 19, 1954, and the by-laws of the company were adopted at the meeting of its incorporators on the same date. This could be regarded as the official date when the spin-off from Capital Transit was effective, although the by-laws of Continental were approved at the first meeting of the Board on May 14, 1954. Capital Transit conveyed Glen Echo Park and other real estate to Continental by deed after April 1, 1954.

The Capital Transit Board of Directors, according to the minutes of its meeting of February 25, 1954, passed a resolution on that date declaring a dividend in kind composed of certain non-transit company properties to be conveyed and transferred to a new corporation to be organized by the officers of Capital Transit in exchange for the issuance of such corporation's capital stock to the stockholders of Capital Transit on a share for share basis. At its May 14, 1954 meeting, the Continental Board authorized the issuance of Continental's capital stock.

On May 27, 1954, Attorney E. L.Jones of the law firm of Hogan & Hartson, of Washington, D.C., stated in a letter to the American Security & Trust Co. that, "It is not necessary in connection with the original issue of such 960,000 shares of capital stock, to register the same under the Securities Act of 1933 as amended." [This letter and related correspondence is appended as Exhibit VII(A).] This sentence in Attorney Jones' letter might well have confused all of the original recipients of this spin-off stock. Any layman reading such an opinion from an attorney might well have assumed that there were no registration requirements whatever relating to the stock.

There is also the letter of January 21, 1955, in which Mr. Joseph Glickstein, Sr., wrote to National Savings & Trust Co. in reference to the share of Continental stock issued in exchange

for the various theatres and real estate, "I am of the opinion that said transactions are exempt under the provisions of the Securities Act of 1933 as amended." [This letter and related correspondence are appended as Exhibit VII(B).]

Granted that to a lawyer it is clear that the letters referred only to the lack of a requirement for registration at the time of acquisition, a layman might well have been confused by the technicalities involved in the complex questions of registration and to him the letters might have conveyed the idea, if mistakenly, that the stock did not require registration at the time of sale. In fact, for most shareholders (Wolfson not included) it did not require registration upon sale, as such sales were over-the-counter transactions which generally in the 1950's and 1960's did not require registration.

Mr. Gould was sent copies of these letters in advance of trial and it was petitioner's understanding that they would be introduced as part of his defense. Though he inquired several times of Mr. Gould when he planned on introducing them, they were, in fact, never introduced.[1/]

1/ There is one legal memorandum which was not brought up at the time of trial and is still clouded by mystery which the petitioner has only been partly able to dispel. This memorandum (which is appended as Exhibit VII(C)) is a ten-page document, dated Sept. 4, 1958, and entitled "Responsibilities and Duties of Corporate Directors, Officers, and Controlling Shareholders." On page 10, at the place for signatures, are the law firms of "Manning, Hollinger & Shea", a predecessor to the firm in which Gould was a partner at the time of trial, and "Glickstein, Crenshaw, Glickstein and Hulsey." The copy of the document which petitioner discovered in the files of Merritt-Chapman and Scott, Inc., is unsigned. Beginning on page 2 of the document, there is a detailed discussion of "Sales by Controlling Persons." Anyone (including petitioner) who received and read the document would be presumed to be knowledgeable as to the technicalities of registratron requirements.

The copy of the memorandum in petitioner's possession was covered by a draft letter, dated October 3, 1958 [Exhibit VII(D) appended hereto.] The letter is on the stationery of the Merritt-Chapman & Scott Corp. Although the draft is directed to no one in particular, from its content it would seem as if it were to be directed to the Directors, Officers, and Controlling Shareholders of the corporation and was to

have been signed by petitioner as President and Chairman of the Board of Merritt-Chapman & Scott Corp. It is petitioner's contention that he never saw the unsigned memorandum or unsigned covering letter prior to his indictment. Had he seen it, he would have registered the Continental stock in question and would never have been indicted and tried.

At the time of the trial, petitioner questioned attorneys Gould and Glickstein as to why he never saw the crucial, warning memorandum. Obviously, one or both law firms believed in 1958 that petitioner and those associated with him in various corporations needed instructions on the technical requirements of registration. As laymen, they could not be expected to be aware of or understand these technicalities. Thus, presumably, there was a need to educate them.

At the time of the trial, petitioner could get neither law firm to confess to the failure to bring the matter to his attention or to send the legal memorandum to him for his own information and for distribution to all of his associates for their warning.

That is where the matter remained until recent months when, for purposes of this petition, Wolfson attempted to clear up the matter. He gathered the names and present addresses of as many officers and directors of Merritt-Chapman & Scott Corp., New York Shipbuilding Corp., Devoe & Reynolds Co., Inc., Tennessee Products & Chemical Corp., Universal Marion Corp., Scullin Steel Co., Marion Power Shovel Co., Southern Pipe & Supply Co. (Scullin, Marion and Southern Pipe were Divisions of Universal Marion), and Continental Enterprises, Inc. The names were taken from the annual reports of the parent corporations for the year 1958. He wrote each of them a letter [See Exhibit VII(E) for a sample] asking them to search their memories and their files to attempt to determine if they had ever seen the 1958 warning.

Twenty-one former officers and directors answered in the negative, sending letters and/or affidavits which are appended as Exhibit VII(F). To petitioner's surprise, two answered in the affirmative [Exhibit VII(G)] and even enclosed a signed copy of the covering letter. From examination and comparison, the signature "L.E. Wolfson" is not the actual signature of petitioner; it can only be surmised that it was placed on the letter by a secretary in the New York office of Merritt.

It is petitioner's statement that he (like the twenty-one others) never saw the memorandum until preparation for trial was underway in 1966. In essence, he believes that he went to jail because none of his attorneys would accept responsibility on behalf of their firms for the failure to warn him.

One particular incident took place in September, 1966, after Mr. Gould assumed the role as lead counsel and head strategist, which raises a question in petitioner's mind as to whether he was not a subject of disloyal as well as incompetent counsel.

Mr. Gould had been advising petitioner and his colleagues, when subpoenaed before the grand jury -- petitioner was subpoenaed despite the fact that he was the obvious "target" of the investigation -- to answer no questions, but rather to invoke the privilege against self-incrimination. Petitioner strenuously objected to this role, saying (correctly) that it would lead to indictment; however, reluctantly, he did follow Mr. Gould's advice.

However, when the prosecutor, Mr. Armstrong, threatened Mr. Glickstein with a subpoena, Mr. Gould advised him to appear voluntarily and not to invoke the privilege against self-incrimination, despite the fact that Mr. Glickstein was intimately involved in the matters under grand jury investigation; in fact, Mr. Glickstein was named as an unindicted co-conspirator in the companion Merritt case. Neither Mr. Gould nor Mr. Glickstein sought petitioner's advice as to whether Mr. Glickstein should voluntarily appear before the grand jury and, if so, whether he should invoke the privilege against self-incrimination and/or the attorney-client privilege. Neither Mr. Gould nor Mr. Glickstein ever informed petitioner that Mr. Glickstein was going to appear before the grand jury; he learned of the appearance only after the fact.

It is clear that, upon Mr. Gould's advice and under threat of subpoena by Mr. Armstrong, Mr. Glickstein did appear before the grand jury on September 18, 1966. It was not possible then

or now to ascertain with any certainty the substance of Mr. Glickstein's testimony. According to Mr. Glickstein, he invoked the attorney-client privilege where appropriate. However, he has no notes as to his testimony and his memory is dim as to the events of that day. [See correspondence appended as Exhibit VII (H).]

Petitioner's efforts to get a copy of the minutes of Mr. Glickstein's grand jury testimony from the government have been unavailing. [See correspondence appended as Exhibit VII (J).]

One of the motions attached to this petition is for the production of the minutes of that appearance. Petitioner is entitled, even at this late date, to see just how and to what extent Mr. Glickstein invoked the attorney-client privilege. Mr. Glickstein has joined petitioner in this request. [See Mr. Glickstein's affidavit of April 28, 1975, appended to the Motion to Produce Grand Jury Minutes, and also a copy of which is appended hereto as Exhibit VII (K).]

Is there any logical explanation for the failure on the part of petitioner's attorneys effectively to defend him? It is petitioner's belief, based upon as much knowledge as he has been able to dig out over several years of diligent effort, that fear motivated the behavior of his attorneys.

In Mr. Glickstein's case, petitioner believes that he was threatened with prosecution in the Continental and/or Merritt cases. In fact, despite his grand jury appearance, he was still named as an unindicted co-conspirator in the Merritt case.

In Mr. Gould's case, petitioner has reason to believe that at approximately the time of his own indictment in September, 1966, there was pending before the Attorney General of the United States a criminal reference report, which emanated from the Office of the United States Attorney for the District of Columbia, and which recommended prosecution of Mr. Gould and others in connec-

tion with the Canadian Javelin case. United States v. Doyle, 348 F.2d 715 (2nd Cir. 1965), cert. den. 86 S.Ct. 89. Petitioner is not aware of the exact charges in the recommendation but he has reason to believe that they were in the broad field of obstruction of justice. Petitioner is appending hereto a Motion that that criminal reference report be produced for inspection by the Court, in camera, with a view toward affirming or refuting petitioner's contention. If, as petitioner believes, his lead counsel was under immediate threat of indictment himself in another S.E.C. case, that would go a long way in explaining his failure effectively to defend petitioner. After all, neither Mr. Gould nor Mr. Glickstein were, in fact, indicted.

If all this talk of ineffective and/or disloyal counsel seems preposterous and outrageous, petitioner would ask the Court's indulgence to read the following rather lengthy excerpt from a recent article by Dean Monroe Freedman of Hofstra School of Law. Dean Freedman is one of the outstanding civil libertarians in the country and an expert in the relationship between S.E.C. regulation and the performance of the so-called S.E.C. bar. The footnotes are eliminated from the excerpt but the article as a whole is printed as Exhibit VI(F), appended hereto.

> .... What has turned the securities Bar from the attorneys' traditional role of champions of their clients into wholly owned subsidiaries in the enforcement conglomerate? Why, indeed, to quote the words of an S.E.C. Commissioner, are "all the verities and truisms about attorneys and their roles in question and in jeopardy?"
>
> In order to intimidate the lawyers, the Commission uses what Chairman Garrett has confessed are "overly crude weapons." He has explained that the Commission "keep[s] the pressure on the professionals" to do the government's job through "suitable incentives." Those incentives include "rewards" as well as "punishments."

The rewards consist of favored treatment to some lawyers in their appearances before the Commission. For example, some few attorneys do receive the opportunity, denied to others, to appear before the Commission before a staff recommendation is approved. That, of course, represents a conscious effort to encourage lawyers to trade off the rights of some clients in order to curry favor with the Commission and thereby advance the rights of other clients. It also amounts to a denial of equal protection of the laws to the clients of those lawyers who are not so favored.

The punishments are directed toward intimidating attorneys into foregoing zealous advocacy on behalf of their clients. One attorney, engaged in vigorous defense of his client's rights, was advised by a staff member that he should "take a look at the National Student Marketing complaint," in which attorneys were named as respondents. Indeed, an attorney may appear before the Commission on behalf of a client, and receive no warning that the attorney is also a target of the investigation. Attorneys have been threatened with subpoenas in the course of hearings, and the attorney arrived at the Commission offices to represent a client, only to be served with a subpoena upon arrival.

The Bar at large has also been reminded that an entire law firm might be disbarred or suspended for a lapse on the part of a single firm member--a sanction that is particularly vicious in view of the fact that disbarment or suspension may result from simple negligence without any showing of improper intent. In one case it was necessary for an attorney to go to the United States Court of Appeals to obtain reversal of a two-year suspension on a charge of improper conduct five years previously. Although the Court ultimately found the Commission's evidence to be insufficient to support a finding of impropriety, and directed the Commission to vacate its order against the attorney, the intimidating effect of such abuses of power is plain. The problem is further compounded by the vagueness of the standards applied by the Commission.

The damaging impact of that kind of tactic upon the attorney-client relationship is illustrated by the comment of one client to an attorney after the attorney had given some overly cautious advice. The client asked, "Are you saying that for my protection or for your own?"

One of the most revealing comments that I have heard illustrating the unhealthy relationship between the Securities and Exchange Commission and the attorneys who practice before it was made by William J. Casey, a former Chairman of the S.E.C., in a speech at the Securities Regulation Institute Conference in San Diego. Mr. Casey had heard that, earlier the same day, I had criticized the Commission and the lawyers who practice before it, but he did not know that I had addressed myself to Chairman Garrett's system of "rewards and punishments." Unaware, therefore, that he was confirming my criticism, Mr. Casey related the story of an irate attorney who appeared at the Commission to protest that a staff attorney had been engaging in arbitrary conduct toward the attorney's client. With obvious approval, as well as relish, Mr. Casey quoted the staff attorney as saying, "Listen, if we weren't as arbitrary as we are, you wouldn't be as fat as you are." The high-minded moral that former Chairman Casey drew from that episode was, "So keep in mind that your practice depends upon what the Commission does." Having established that securities regulation attorneys reap financial rewards from the privilege of practicing before the Commission, Mr. Casey then went on to admonish the attorneys that they have a professional responsibility to "force" their clients toward "a process of disclosure."

There are two justifications that are frequently suggested in support of the revolutionary notion that attorneys in the field of securities regulation should play the role of government enforcers and informers against their clients rather than the traditional lawyers' role of counsellors and advocates. The first justification is that securities regulation frequently involves civil or administrative sanctions only, and not criminal penalties. It is contended, therefore, that due process rights are inapplicable. The S.E.C. has taken the position, however, that it has the power to simultaneously pursue civil, administrative, and criminal litigation against identical defendants in common fact situations. Moreover, it is well established that governmental action that has the effect of impairing important property rights must comply with due process standards even in a purely civil context. Thus, before the government can terminate welfare rights, permit garnishment of wages by a creditor, permit replevin of a television set, or suspend a driver's license, the affected party must be afforded both notice and an opportunity to be heard "at a

meaningful time and in a meaningful manner," and "the fact that there is a later constitutionally fair proceeding does not alter the result." Moreover, the court has specifically recognized that such rights must be respected where "any significant property interest" is affected, even though the deprivation "may only be temporary."

In the light of those principles, it seems clear that a business person should not be deprived of the property right represented by business good will, as a result of fundamentally unfair tactics employed by the Securities and Exchange Commission in an investigative proceeding.

A second justification that is often asserted for compelling the S.E.C. lawyer to work for the government rather than for his or her client is the notion that there is an essential distinction between the litigating attorney and the office attorney. What that argument ignores is that our legal system is basically an adversarial one, and every lawyer--whether drafting a contract, counseling in a business venture, writing a will, or performing any other service on behalf of a client--acts in such a way as to protect the client from being at disadvantage in potential future litigation. Particularly should that be so, in a free society, when the potential adversary is the government itself. In that sense, and it is a crucial one, every lawyer is an advocate, irrespective of whether he or she ever enters a courtroom.

In elaborating the fallacious distinction between the litigating attorney and the office attorney, Professor Morgan Shipman, in his remarks at the San Diego Conference, adverted to Disciplinary Rules 4-101 and 7-102 of the Code of Professional Responsibility. His reliance, however, was misplaced. Under DR 4-101 the lawyer is required to preserve the confidences of the client. Even the lawyer who knows that the client intends to commit a crime is not required to reveal that fact, but is merely permitted to do so. It is true that DR 7-102 (B)(1), says that a lawyer who receives information clearly establishing that the client has perpetrated a fraud must call upon the client to rectify the fraud. Further, the original ABA draft goes on to say that if the client refuses to rectify the fraud, the lawyer "shall reveal the fraud to the affected person or tribunal." Significantly, however, that quoted provision was put to a vote of the Bar in the District of Columbia (the jurisdiction in which the S.E.C. is located), and by an overwhelming vote of the Bar, the clause was eliminated. Thus, although the lawyer does have an obligation to urge the client to correct any false statement to the S.E.C., the lawyer has no obligation to report the client to the authorities if the client declines to take the lawyer's advice.

In sum, therefore, securities regulation is characterized by denial of the right to counsel, corruption of the independence of the Bar and of the traditional professional standards of attorneys' obligations to their clients, a police-state system of investigation, and denial of a variety of other basic due process rights.....

If Dean Freedman is even half right, it would not be preposterous to discover that in fact petitioner's attorneys in the S.E.C. case failed utterly to give him effective assistance of counsel. Petitioner knows that Attorney Glickstein was made an unindicted co-conspirator in the Merritt Case. Was his non-indictment bought by his Grand Jury testimony? And as to lead attorney Gould, was he under threat of indictment at the very time he was ostensibly defending petitioner?

PART VIII

CONFLICTS OF INTEREST

It is difficult to believe that this prosecution, already shown to be besmirched and befouled in so many ways, was also riddled with a number of conflicts of interest which denied to petitioner his constitutional right to a fair trial, and which materially contributed to his wrongful conviction.

A. Paul Grand

One of the prosecutors in the Continental Case and the Chief Prosecutor in the Merritt Case was an Assistant United States Attorney named Paul Grand. Unfortunately, Mr. Grand's father had had a bitter feud with co-defendant Gerbert; Mr. Grand was well aware of the feud and obviously should have asked to be recused; however, in keeping with everything else in this prosecution, he failed to do so. Petitioner was not aware of this conflict until after the close of the Continental trial. [An affidavit of August 29, 1974, describing this whole matter, executed by Mr. Elkin

Gerbert, a co-defendant in both the Continental and Merritt trials, is attached hereto as Exhibit VIII(A).]

B. Paul Galvani

A young man named Paul Galvani, who, for three years, had been trial Judge Palmieri's law clerk was a member of the prosecution team. In fact, he served with Judge Palmieri until three days before the indictment came down in the Continental Case. He, too, should have recused himself because of the conflict of interest, but he did not; nor, apparently, did Judge Palmieri insist that he do so. He continued to serve despite his intimate friendship with the trial judge. It is a harsh comment but, we believe, a fair one to say that this is one court that cared little for even the appearance of fairness.

C. Arthur Liman

Mr. Arthur Liman, who acted as attorney for a co-defendant in the Merritt Case, simultaneously acted as a Special Assistant United States Attorney in the Southern District of New York, in the prosecution of the case of United States v. Lowell M. Birrell. He was appointed at the personal request of the United States Attorney, Mr. Morgenthau. The Continental Case was then on appeal.

Again, as in the Galvani-Palmieri relationship, it is difficult for petitioner to know precisely how he was damaged. However, it obviously disadvantages a defendant to have a defense counsel also acting as a prosecutor at the same time, in the same court, and in a case involving the same United States agency, i.e., the S.E.C. In fact, the Wolfson cases and the Birrell cases were the most celebrated S.E.C. cases of their era, and one of the lawyers was working both sides of the street.

D. Milton S. Gould

Milton S. Gould, who acted as petioner's trial attorney in the Continental Case, and two of his partners are known to have had an ownership interest in the late 1960's, in the brokerage firm of Weis, Voisin, and Cannon, Inc., of New York, a firm very closely regulated by the S.E.C. It is not known if they had an interest, monetary or otherwise, during the years 1966-1968, when their firm represented petitioner. It is petitioner's hope that the Court will grant limited discovery on this point; petitioner desires to know if his defense counsel, as well as others, had a potential or actual conflict of interest in this regard also.

PART IX

KNOWING USE OF PERJURED TESTIMONY

A. The Law

The federal courts are, for the most part, agreed that a denial of due process is not established by proof merely that perjured testimony was introduced in a prosecution for crime; denial of the federal constitutional right is shown only where as here, it appears that such tainted testimony was knowingly and intentionally used by the prosecution. Alcorta v. Texas, 355 U.S. 28, 2 L.Ed. 2d 9 (1957); Mesarosh v. United States, supra, at 14; Mooney v. Holohan, supra, at 112-13; Levin v. Katzenback, supra, at 165 (Burger, J.); Coggins v. O'Brien, supra, at 139 (Magruder, C.J. concurring); United States v. Rutkins, 212 F.2d 641 (3rd Cir. 1954); Smith v. United States, 252 F.2d 369 (5th Cir. 1958); Taylor v. United States, 229 F.2d 826 (8th Cir. 1956); Palakiko v. Harper 209 F.2d 75 (9th Cir. 1953); Note, "The Prosecutor's Constitutional

Duty to Reveal Evidence to the Defendant," 74 Yale L.J. 136, 138-40 (1964); Alschuler, Courtroom Misconduct by Prosecutors and Trial Judges, 50 Texas L. Rev. 629 (1972).

Fundamental fairness does not require the courts to set aside an otherwise valid conviction on the grounds of perjured testimony where there is no likelihood that the false testimony harmed the defendant or that truthful testimony by the witness would have aided the defendant. See Mesarosh v. United States, supra, at 9 and n.4; United States v. Polisi, 416 F.2d 573, 577-579 (2nd Cir. 1969); United States v. Strauss, 443 F.2d 986, 989-990 (1st Cir. 1971). However, where there is perjured testimony, the burden is on the prosecution to show that such perjury is harmless, and that it did not in fact contribute to the conviction. Chapman v. California, 386 U.S. 18 (1967).

Where the perjured testimony is not proved harmless, a new trial is demanded. Chapman v. California, supra; United States v. Miller, 61 F.Supp. [illegible] (S.D.N.Y. 1945); Newman v. United States, 238 F.2d 861 (5th Cir. 1956). Even though it does not solicit false testimony, the Government has an obligation to correct false evidence given by its own witnesses for whose credibility it vouches. Napue v. Illinois, 360 U.S. 264 (1959); Alcorta v. Texas, 355 U.S. 28 (1957).

A writ of error coram nobis will be granted where false testimony was knowingly used by the prosecution. People v. Zimmerman, 10 N.Y.2d 430, 224 N.Y.S.2d 2, 179 N.E.2d 849 (1962); People v. Robertson, 12 N.Y.2d 355, 239 N.Y.S.2d 673, 190 N.E.2d 19 (1963); People v. Sadness, 300 N.Y. 69, 89 N.E.2d 188 (1949), cert. den. 338 U.S. 952, 94 L.Ed. 587, 70 S.Ct. 483; People v. Smith, 202 Misc. 694, 108 N.Y.S.2d 703 (1951). Furthermore, a New York court has held that where false testimony affecting the issue of the voluntary or involuntary nature of the defendant's confession to a robbery charge, was given by the very police officer who was

in charge of the investigation, the defendant was entitled to coram nobis relief, although such falsity was unintentional and was not known to the prosecution at the time of the trial. People v. Robertson, supra.

In the instant case, it is petitioner's contention that the most important witness before the grand jury, Mr. Stuart Allen, an employee of the S.E.C., gave false testimony, which both he and the prosecutor knew to be false. Further, in petitioner's view, it is clear that except for Mr. Allen's false testimony, there was no basis for a true bill. (See Subsection B, infra.)

Further, Mr. John Morley, the Wolfson family broker, either perjured himself in his sworn testimony before the S.E.C. in 1965, or in his later testimony before the grand petit juries. The prosecutors were well aware of the falsities and conflicts, but with the court's help they concealed much of this from defense counsel. Morley's testimony was crucial to the conviction. (See Subsection C, infra.)

B. Perjury by John J. Morley

It shall be the purport of this section to show that John J. Morley, the Government's chief witness at the trial, perjured himself when he appeared before the grand jury in 1965, or when he appeared as a witness at the trial in 1967, or both. However, before going into the details and importance of this perjured testimony, it is essential to put it into context by describing the relationship between Morley and petitioner.

The relationship began in approximately 1947, when petitioner was just beginning his career in finance, and Morley was a young stockholder in Jacksonville. Through the years, petitioner, members of his family, and his associates, gave an increasing

amount of their brokerage business to Morley. By Morley's own admission, Wolfson et al, were his most substantial clients through the years. In fact, their business made him a very wealthy man. In time, he became manage of A.M. Kidder's office in Jacksonville, and a vice-president of its successor, Reynolds & Company.

There are indications that Morley and/or Kidder-Reynolds in New York, had some doubts about sales of unregistered Continental stock; in fact, they commissioned a long, legal memorandum from Cravath, Swain & Moore [appended hereto as Exhibit IX(A)]. Unfortunately, they never showed the memorandum to petitioner or his associates. Nor did it slow down Morley's acceptance of orders from the "control group". Exhibit IX(B), appended hereto, documents how Morley repeatedly broke the one percent limit of Rule 154 after receiving the Cravath, Swain & Moore warning, presumably because of his interest in the large brokerage fees involved.

As Section 5 of the Securities Act of 1933, and S.E.C. Rule 154 apply primarily to brokers and dealers and only secondarily to shareholders, he must have known he personally was in for serious potential trouble when the S.E.C. began its investigation of petitioner in 1965. By what the Government will undoubtedly claim is pure coincidence, Morley was (to petitioner's best knowledge) the only one of petitioner's many brokers that is known to have been taken before the grand jury; yet each and every transaction which underlay the nineteen counts in the indictment had been handled by other brokers. Before the grand jury and at the trial, Morley, who in effect had been immunized, swore that he had repeatedly warned petitioner and his associates about the restrictions on the sale of Continental stock. Many of the other brokers involved in the nineteen transactions testified at the trial, but not a single one had a clear recollection of ever having issued a similar warning. [Parenthetically, it might be added that neither Morley nor the other brokers were charged either civilly or criminally.]

But was Morley's testimony before the grand jury and at the trial to be believed? What was his credibility?[2/] Exhibit IX(D), appended hereto, sets forth in some detail just a few examples of the broad perjury engaged in by Morley in 1965. Some of the lies are brazen, some are subtle. Many misstatements went unnoticed (or at least unnoted) by the S.E.C. questioners. Yet, they caught him in a number of false statements and brought him up short on them. Even at this early date, the S.E.C. knew that Morley's word could not be trusted. Yet, apparently, he was the only broker taken before the grand jury and the principal witness at the trial.

The truth of the assertion that Morley lied to the S.E.C. in 1965 is strengthened by the affidavit of Michael C. Holloway, who was a broker with Reynolds and Co., in 1964, and who in 1965 handled a commodity account for petitioner. After the Continental Case had ended and petitioner had served his term, Holloway had several conversations with Morley. Holloway took the precaution of recording the conversations, which turns out to be fortunate, since Morley has since died. In the conversations, according to Holloway's affidavit, Morley admitted perjuring himself in 1965, ostensibly to back up the testimony of Elkin Gerbert. However, an examination of his perjured testimony would seem designed primarily, if not exclusively, to cover his own failings to observe S.E.C. regulations. In any event, he admitted perjury,

2/ A very small corner of this question was raised in a post-trial motion to set aside the verdict; notice of this motion and an accompanying affidavit is appended hereto as Exhibit IX(C); it dealt only with certain false evidence given by Morley with respect to the disposition of 400,000 shares of stock in American Motors; the full text of the transcript of Morley's first sworn testimony to the S.E.C. in 1965 was not available to petitioner's attorneys at that time, and they were unaware of much of that testimony.

though downplaying his key role ir the trial. A copy of Mr. Holloway's affidavit is appended hereto as Exhibit IX(E).[3/]

If there is any question as to Morley's credibility gap, a comparison of his 1965 sworn testimony and his 1967 trial testimony is proof of the pudding. Such a comparison is contained in Exhibit (IX(F), appended hereto. It will be noted that in some cases it is difficult to tell whether Morley was lying in 1965 or in 1967; what is crystal clear is that he was perjuring himself on one occasion or the other.

As to the crucial importance of Morley's testimony, one need only look at the closing argument of the prosecutor and the trial judge's charge to the jury. Mr. Armstrong's closing argument stresses the central importance of Morley's testimony to the charges against petitioner. And the judge, in his charge, said:

> There is that conversation with Morley. Because in this case -- and there is no biding the fact that Morley is a very important witness, because a great many details of significance have been testified to by Morley and denied flatly by the defendants.
>
> You have to decide -- it is going to be one of the important responsibilities you will have in this case, to decide whether you believe Morley on the one hand or whether you believe Gerbert or Wolfson on the other hand, because depending upon which one of these witnesses you believe it will take you a considerable way on the road to deciding the controverted issues in this case.
>
> You will remember that Morley testified that in 1958 he had a conversation with Wolfson. It wasn't apparently a particularly pleasant conversation. Over the application of the registration requirements on his stock in American Motors Corporation and that in the course of this argument Mr. Wolfson asked Mr. Morley if he thought his lawyers were better than Wolfson's. Mr. Wolfson denies this conversation ever took place. Mr. Morley was quite specific about that conversation, what led to it, what was said, and what he warned Wolfson about. Wolfson denies it.
>
> There you have one of the many points of conflict between Morley and these defendants, and you will have to resolve these conflicts. [Transcript, pp. 2256-57].

3/ Another interesting thing to note is that when the S.E.C. questioned Morley in 1965, there were not less than sixteen "off the record discussions" which will never be explained.

There can be little question that Morley's testimony was false, that it was material to the case, and that its falsity was known or should have been known to the prosecutors.

C. Testimony of Stuart Allen

Stuart Allen was the chief investigator for the S.E.C. in the Continental Case. He stayed with it, day in and day out, for several years, from its inception until its end. He participated in most (if not all) witness interviews. He also testified twice before the grand jury; once on August 18, 1966, and then again on September 19, 1966. It is this testimony which turns out to be false and misleading if not perjurious. Because of its hearsay nature, it is difficult to characterize.

At his appearance on August 18th, he explained that Continental stock had been sold through ten different brokerage houses. Then going through the brokerage houses one by one, Mr. Armstrong would ask him whether the particular broker handling the transactions had been interviewed. Then he would be asked whether they inquired of petitioner or his associates whether they were selling "controlled stock." For example, with respect to the brokerage firm of Shearson, Hammill, the Questions and Answers went like this:

Q. Who was the customer's man at Shearson, Hammill?

A. R. Robert Van Tuyl.

Q. Has Mr. Van Tuyl been interviewed by the S.E.C. recently?

A. Yes.

Q. Has Mr. Van Tuyl been interviewed in the United States Attorney's office here?

A. Yes.

Q. Recently?

A. Yes.

Q. And Mr. Van Tuyl stated, did he not, that Mr. Gerbert placed the orders in the Wolfson account?

A. Yes.

Q. Did not Mr. Van Tuyl also state that it was the fixed policy of his firm in 1961 to inquire as to whether or not stock in large blocks were coming from individuals who might be connected with the company was, in fact, controlled stock?

A. Yes.

Q. Is it not a fact, too, that Mr. Van Tuyl stated that under the circumstances of these particular sell orders of Continental stock, it would have been the practice of his firm, and his own practice, to inquire of Mr. Gerbert whether or not the stock was controlled stock, and if so, whether or not there was a valid exemption?

A. Yes.

Q. Is it not also a fact that Mr. Van Tuyl testified that as a part of his regular business practice, he had not received a satisfactory response to his question, he would not have taken the order?

A. Yes.

Q. And is it not a fact that Mr. Van Tuyl testified that as a matter of practice he must have asked Mr. Gerbert whether or not there was any controlled stock problem with this particular stock?

A. Yes.

Q. And that he must have had a satisfactory reply?

A. Yes.

[Grand Jury testimony at pp. 7-8]

However, when Mr. Van Tuyl testified at the trial, the following colloquy occurred:

Q. Did you in whatever conversations you may have had with Mr. Gerbert on the subject of compliance with the security law and I am only talking about the sale of Continental, sir, did you ever ask Mr. Gerbert what was Mr. Wolfson's relationship to Continental Enterprises?

A. I did not.

Q. Actually your sales were for Mr. Wolfson?

A. That is right.

Q. So the salient fact as far as you knew it was what was Wolfson's relationship to Continental Enterprises, am I not right?

A. It is a salient fact but I think you have to view it in the context of this transaction. I asked Mr. Gerbert if the stock was free for sale and I took at face value because of the confidence I had in him.

Q. But you don't remember specifically?

A. I don't recall the specific words I used or he used except I got the assurance.

Q. You were satisfied with what he told you?

A. I was.

Q. You regarded him as a man of great sophistication in this subject?

A. Sophistication and integrity, yes.

Q. Did you ever make any memorandum of what you asked Gerbert and what Gerbert told you?

A. I did not.

Q. Did you examine the annual reports of Continental?

A. Not at that time, no.

Q. Did you know at any time what was the extent of Mr. Wolfson's interest in Continental?

A. I did not.

Q. Did you make any effort to find out?

A. I did not.

Q. Did you know when you spoke with Mr. Gerbert whether Mr. Gerbert was himself an official or otherwise connected with Continental?

A. I did not.

Q. Did you make any efforts to find out?

A. I did not.

Q. As far as you were concerned then Gerbert was just an individual acting as an agent for an individual named Wolfson?

A. Who had been specifically authorized to do so.

Q. An authorized agent?

A. Right.

Q. On Mr. Wolfson's account?

A. That is correct.

Q. So we have it you didn't make any inquiry as to what the relationship of either of them was to Continental?

A. That is correct.

Q. You had only Mr. Gerbert's assurance, the language of which you cannot recall, that the stock was free to be sold?

A. That is correct.

[Trial Transcript 553-556].

Or take the case of Baird & Company. Mr. Allen gave the grand jury this interpretation:

Q. I direct your attention, sir, to Baird & Company: How many shares were sold through Baird & Company?

A. A total of 32,900 shares; 22,800 for the account of Louis Wolfson, and 10,000 for the account of Saul Wolfson.

Q. Total proceeds of $190,172, is that correct?

A. That's correct.

Q. And who place the orders in those accounts?

A. Mr. Elkin Gerbert.

Q. Who was the individual at the brokerage firm who handled the account?

A. Mr. David Baird.

Q. And Mr. David Baird had been interviewed by the S.E.C., and he has also testified in the office of the United States Attorney; is that not correct?

A. Pardon; I'm sorry.

Q. Well, Mr. Baird has testified -- I'm sorry. Mr. Baird has been interviewed in the office of the United States Attorney, has he not?

A. Yes.

Q. Mr. Baird was not interviewed by the S.E.C.?

A. He was interviewed in the office.

Q. But his testimony was not taken under oath at that time?

A. No, it was not.

Q. Is is not a fact that Mr. Baird stated that his firm policy, in accordance with his usual business policy, would have been to have inquired as to the control position of this stock at this time that the orders were made with him?

A. Yes.

[Grand Jury Transcript, p. 10].

But, here is what Mr. Baird said at the trial:

Q. Directing your attention to the time Elkin Gerbert placed these sell orders, do you recall saying anything to Mr. Gerbert regarding S.E.C. restrictions on the sale of control stock?

A. No, I have to say very respectfully and humbly, because I am an inside partner, I suppose I have handled fifteen or twenty thousand orders since that time, I have no clear recollection of any specific comments or questions made by me or directed by me to Mr. Gerbert or advanced by him.

[Trial Transcript, p. 709].

There are a number of examples which are more or less repetitive. In summary, however, it can be said that Allen told the grand jury that there was a whole list of brokers, other than Morley, who had told the S.E.C. that they had inquired closely of Wolfson and his associates re controlling persons before

accepting orders to sell Continental shares. When these same brokers were put under oath at the trial, there was a different story. Some denied asking the questions; some could not recall. Not a single broker, except Morley, had a clear recollection of checking on Rule 154 and its one per cent provision. Allen, if he did not technically perjure himself before the grand jury, certainly misled that body in a wilful manner.

PART X

IMPERMISSIBLE DISCRIMINATORY PROSECUTION

A. The Law

The Fourteenth Amendment to the United States Constitution prohibits any state from taking any action which would "deny to any person within its jurisdiction the equal protection of the laws." This admonition is applicable to the Federal Government through the Fifth Amendment. Bolling v. Sharpe, 347 U.S. 497 (1954); Washington v. United States, 4011 F.2d 915, 922 (D.C. Cir. 1968). The promise of equal protection of the laws is not limited to the enactment of fair and impartial legislation, but necessarily extends to the application of these laws. The basic principle was stated in 1886 in Yick Wo v. Hopkins, 118 U.S. 356, 373-374.

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Yick Wo was concerned with an abuse of discretion in the administration of a public ordinance by a city licensing board, and not with the activities of law enforcement officials who presumably prosecuted all Chinese who violated the commands of the

licensing board. The underlying principle has nevertheless been properly held to apply to the actions of prosecutors and police officials. Two Guys from Harrison-Allentown, Inc. v. McGinley, District Attorney, 366 U.S. 582, 588 (1961); United States v. Steele, 461 F.2d 1148 (9th Cir. 1972), Washington v. United States, supra, at 924.

In Oyler v. Boles, 368 U.S. 448, 456 (1962), the Supreme Court noted that "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" and went on to state that since it had not been alleged "that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification" there were no grounds to support a finding that the equal protection clause had been violated. Thus, it has been argued that a person attempting to defend himself against the discriminatory enforcement of a law must show that he is a member of a class against which the law is being selectively enforced.

Recently, in United States v. Berrios, 501 F.2d 1207 (2nd Cir. 1974), the Second Circuit said:

> To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometimes referred to as "intentional and purposeful discrimination." See Snowden v. Hughes, 321 U.S. 1,8 (1943); Moss v. Hornig, 314 F.2d 89, 92-93 (2nd Cir. 1963); United States v. Ahmad, 347 F.Supp. 912 (M.D.Pa. 1972), aff'd sub. nom. United States v. Berrigan, 484 F.2d 171 (3rd Cir. 1973); United States v. Falk, 479 F.2d 616 (7th Cir. 1973) (en banc); United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972); United States v. Steele, 461 F.2d 1148 (9th Cir. 1972). See Comment, "The Right to Nondiscriminatory Enforcement of State Penal Laws." 61 Colum. L.Rev. 1103 (1961). Mere "conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." Oyler v. Boles, 368 U.S. 448, 456 (1962).

Also, in a recent case, United States v. alk, No. 70 CR 515, decided April 1[illegible] 1973, the Seventh Circuit Court of Appeals found that where intentional discrimination is alleged, the Court must hear evidence on the allegations. In Falk, the defendant was charged with refusal to submit for induction and with failure to possess a draft registration card. In both pre-trial and trial motions, defendant attempted to present evidence which would have shown an impermissible prosecutorial purpose in that the Government was aware of many similar violations and that others were not being prosecuted. Official policy statements of the Selective Service System were prevented to support Falk's position. The trial court refused a hearing on the offers of proof. Falk was convicted.

On appeal, the Seventh Circuit vacated the conviction and remanded the case to a different judge for a hearing on the issue of selective prosecution, (Slip Opinion at p. 13), stating that there were particular circumstances in the case "which we believe compelled the Government to accept the burden of proving non-discriminatory enforcement of the law." (Slip Opinion at p. 7). The particular circumstances in Falk included, inter alia, official policy statements of the Selective Service System which indicated that registrants should not be prosecuted for minor offenses; the fact that the defendant was a vocal dissenter against the war in Vietnam; and that the prosecutor had allegedly told defendant's attorney that a good deal of the Government's trouble in enforcing the draft laws came from people like Falk. (Slip Opinion at pp. 8-9).

Another little known but relevant case is United States v. Robinson, 311 F.Supp. 1063 (W.D.Mo. 1969). In this case, the trial court dismissed all wiretap charges against a private detective on the ground that the federal government never charged

federal agents with similar charges for similar offenses. The class discriminated against in this case was private citizens. The case is also somewhat unique in that the Government was shown to have had an improper motive against Robinson in that they were retaliating against him for testifying under subpoena before a Senate Subcommittee studying illegal Government wiretapping and eavesdropping.

There is, however, a question of timeliness with respect to the question of discriminatory prosecution. The decision by the Supreme Court in Davis v. United States, 411 U.S. 233, 93 S.Ct. 1577 (1973), raises a question as to whether this defense remains available to petitioner. In Davis, the Court held that defenses relating to the institution of the prosecution, including those involving constitutional claims, must, under Rule 12(b)(2) of the Federal Rules of Criminal Procedure, be raised by pre-trial motion. They are expressly termed waived by failure to present them at that time, absent a showing of "cause."

Why should the court grant relief from the waiver in petitioner Wolfson's case? What can he produce in the way of good cause?

First, the whole pattern of the discriminatory process was not at all clear at the time of petitioner's indictment. It has taken several years of painstaking and costly effort on petitioner's part to dig out and assemble most of the elements of this defense.

Second, as will be shown below, the fact of discriminatory prosecution in the Continental Case was greatly buttressed by the equally discriminatory way in which he was prosecuted three separate times in the Merritt-Chapman Case which followed on the heels of the Continental Case.

Third, back in 1966 such things as "enemies lists" were nothing more than speculation; a defense based on a charge that one was prosecuted because he was on "a list" would have been exceedingly difficult to prove. However, in this post-Watergate era, we are forced to take these lists seriously. We know that the White House had such a list. We know that the Internal Revenue Service had such a list. Petitioner has been told that the S.E.C. has maintained an informal blacklist for years and that, because he was an outspoken maverick, he was on this list. Unfortunately, at this time, he has no documentary proof of these allegations. Hopefully, before this case is closed once and for all, he will have an opportunity to put on evidence that will substantiate that such a blacklist existed and that his name was included thereon.

Last, petitioner had an ineffective and/or disloyal lead counsel who was not inclined to fight too hard for his client's rights. A defense of selective or discriminatory prosecution would have greatly angered the S.E.C. and that was not designed to help the lawyer in his predominantly S.E.C. practice.

A defense of discriminatory prosecution might have been laughed out of Court before the Continental Case went to trial; but, in light of all the circumstances and all that has later come to light, it is now clear that there was discriminatory prosecution, and petitioner should not be deemed to have waived this defense for purposes of this writ of error.

B. A unique Case

There is no single case in the 41-year history of the S.E.C. comparable to this one. In no other instance, before or after Continental, has a technical, non-fraudulent violation of Section 5 and Rule 154 (sales by controlling persons of over-the-

counter stock) in unsolicited brokerage transactions resulted in criminal indictment. That there was no fraud charged or proven in the instant case is made clear in prosecutor Armstrong's opening statement to the jury and Judge Palmieri's charge to the jury to the same effect.

S.E.C. sanctions consist either of administrative sanctions; civil proceedings, including injunctive relief; and criminal sanctions. When fraud is not involved, most Section 5 violations are investigated and closed with no civil or criminal sanctions whatever. However, injunctive relief is sometimes sought. Yet, with the exception of the present case, there is not a single criminal prosecution for a simple, non-fraud violation of Section 5.

Petitioner has had a survey made of all S.E.C. enforcement proceedings from the beginning (1935) to the time of indictment in this case (1966). The detailed results of this survey are contained in Exhibit X(A) appended hereto. In summary, in the thirty-year period, the S.E.C. brought 2154 injunctive proceedings; of these, 461 were for simple Section 5 violations. During the same period, the S.E.C. brought 2376 criminal prosecutions; of these only ten involved Section 5 violations; of these ten, each involved notorious elements of fraud; several of the cases involved fraudulent gold mining promotions; others involved fraudulent schemes using conduits in foreign countries; in others, the defrauders became fugitives; many of these ten cases are unreported in the federal reporter system.

There are very good reasons why the S.E.C. has used administrative or injunctive, rather than criminal, sanctions in simple, non-fraud Section 5 cases. First and foremost, a simple Section 5 case falls into the class of malum prohibitum, not malum per se. A violation, if any, is extremely technical. The presence or absence of a violation calls for the opinion of expert lawyers, who specialize in the securities field and who

are accustomed to advising underwriters and distributors of shares in a public (as distinguished from a private) offering. The difference between public and private offerings covers a gray area. It is governed by a multitude of factors, including the timing of the offering, the size of offering, and many other variables including the number of persons who purchase, whether they are solicited or not, whether recognized stock exchange media are used to make the sales in broker transactions, etc., etc.

Also, there are recognized exceptions to the requirements of registration. These are related to the identity of the sales, the nature of the securities being offered, the type of transactions used, the spacing of sales, the number of shares available to be offered, the value of shares, whether the shares are being recommended by the seller or by someone completely unrelated to the seller, whether the shares are bona fide unsolicited transactions by the brokers, whether the shares were taken in a spin-off or a part of a merger or acquisition with no redistribution to the public intended, etc., etc.

In light of these variables and the lack of clear-cut understanding of the need for registration, it is axiomatic that there almost never is a simple Section 5 situation that meets the requirements of criminal intent and motive. Since any federal crime requires wilfulness, a criminal Section 5 case is so rare as to be found only in the most special circumstances, e.g., a promoter-lawyer-adviser who intends to conceal what have to be fraudulent sales of worthless securities. Invariably, in these cases there are indicia and circumstances indicating criminal intent and motive; where, as in the Continental Case these indicia and circumstances are absent, a criminal prosecution of a simple Section 5 case can only be considered as selective prosecution. These indicia and circumstances include:

1) sales of worthless securities, of issuing companies that were either "shell" companies, or had no recognizable assets, no earnings, and no prospect of success;

2) no real claim of exemption from registration;

3) active solicitation of persons to buy the shares in a well-organized, well-directed public offering;

4) material misrepresentations, as distinguished from omissions, with a concentrated pattern and use of other than reputable New York Stock Exchange member firms to assist in the unregistered distribution;

5) concealment of the source of the shares being offered, by using the issuer as the purported source (with the proceeds then being syphoned off by the promoters into their own pockets); by using dummy and nominee accounts difficult to be traced to the real principals and real parties in interest; by using foreign accounts, Canadian or Carribean brokers, Swiss bank accounts, and the like;

6) by obtaining large blocks of shares from an issuing company in exchange for worthless assets or properties, and then selling these blocks of shares publicly, without adequate disclosure and by misrepresentation;

7) by abandoning the venture once the shares have been sold;

8) by using boiler-room, telephone solicitation to sell the shares;

9) by obtaining worthless legal opinions from unscrupulous participating counsel;

10) by selling mainly to those who could not afford to lose.

The circumstances of sale in the Continental Case were exactly the opposite in every way. The issuer was a public company, a fully operating company with enormous potential; the issuer had bona fide management and bona fide operations; the sellers paid as much for the shares as did any other shareholder; this was not unseasoned promotion; this was a company with a history and many years of operation; it was a public reporting company, filing periodically and regularly with the S.E.C. There was no concealment by the seller of his identity; major New York Stock Exchange member firms were used in the sales; there was no solicitation, no telephone confidence men employed, no spurious legal opinions.

Another element of discrimination is present in this case due to the extremely technical nature of Section 5 and Rule 154 under which petitioner was prosecuted. Rule 154 in particular was subject to different S.E.C. interpretations through the years.

Further, Section 5 and Rule 154 were intended to apply first and foremost to brokers, securities firms, S.E.C. lawyers, and other professionals in the securities field. Therefore, in a slightly different vein, was there not selective prosecution of petitioner and one other (Gerbert) and the non-indictment of:

1) the selling brokers, the registered representative who took the sell orders;

2) the transacting New York Stock Exchange member firm who actually effected the sale transactions;

3) the attorneys who advised Wolfson he could sell without registration or who failed to advise him that his sales seemed to need registration;

4) the actual management of the issuing company which knew of the sales and did nothing to prevent him or require registration;

5) the issuing company itself, which, if Wolfson was really being tried for non-disclosure, were equally chargeable

with respect to all shareholders and the public;

6) the auditors for the issuing company, similarly chargeable for non-disclosure and inadequate audited financial annual reports;

7) the investment advisers who acted in that capacity for Wolfson.

Morley and nine or ten other brokers ignored Rule 154 in their dealings with petitioner and his co-defendant. Yet, none of these brokers, lawyers, advisers, etc., were ever charged civilly or criminally. So far as petitioner can ascertain, not a single one was ever subjected to an administrative proceeding at the S.E.C. or even a mild reprimand by S.E.C. These were the men who were supposed to be schooled in the law and the regulations of the S.E.C., and they all went scot-free.[4/]

4/ Another shining example of the extreme disparity of treatment in S.E.C. cases involves William J. Casey, former Chairman of the S.E.C. When his nomination was being considered by the Senate, the question arose of Boggs v. Casey, et.al, a civil action in the Federal District Court in New York. Plaintiff, a disgruntled shareholder, claimed damages against Casey and others as "controlling persons" who failed to register and who contravened Sections 5 and 17(g) of the Securities Act. The case is described in a Department of Justice memorandum of February 26, 1971, from William Rehnquist to Senator Sparkman. [This memorandum is reproduced as Exhibit X(B), appended hereto; the whole matter is discussed at length in Hearings Before the Senate Committee on Banking, February 10 and March 9, 1971, on Mr. Casey's nomination.] Boggs v. Casey was disposed of by a settlement, and Casey was never brought up by the S.E.C. on either civil or criminal charges; in fact, he was confirmed as S.E.C. Chairman. He was Chairman during the latter part of the time that the United States was criminally prosecuting petitioner in the Second and third Merritt trials.

C. Impermissible Prosecutorial Purpose

If, as has been demonstrated, petitioner's prosecution was the result of impermissible discrimination, is it possible to ascertain why he was subjected to such discrimination? From the standpoint of this motion for a writ, it is not essential for petitioner to prove the purpose of the discrimination; indeed it would be impossible for him to prove motive in this type of situation. He does, however, feel an obligation to attempt to set forth the factors he believes contributed to his being singled out; also, quite frankly, he believes this may make it easier for the Court to grant the requested relief.

Petitioner is far from the stereotype that inhabits either the canyons of Wall Street or wanders the corridors of the S.E.C. He was a Southern, Jewish boy of modest means who got his start in the scrap business in Jacksonville, Florida. He was bold and imaginative. He gained control of a number of large corporations; he tried to gain control of others. He was a liberal Democrat. He was a philanthropist. From the standpoint of Wall Street and the S.E.C., he was an upstart.

More importantly, he was anti-establishment and quite loud about it. There were many things about our system of government and our system of justice which he thought needed drastic changes. He made speeches. He wrote articles. He made himself a thorn in the side of the United States Government. Some examples of his highly critical and unpopular statements are contained in Exhibit X(C).

It is not insignificant that the venue for this unique Section 5 indictment was brought (over petitioner's vehement protest) in the Southern District of New York and not elsewhere. It was not brought in Florida where Wolfson and Gerbert resided, where the sales of stock originated, where the selling brokers did business, where the issuing company was located, and where the corporate headquarters and records were maintained. It was not brought anywhere in the South were most of the purchasers resided. It was not brought in Washington where Continental filed its reports and the complaining agency was headquartered.

Is it not selective prosecution <u>in fact</u>, if not in past legal precedent, to insist that a man be tried where he is least able to defend himself. He was tried in a place where he would have neither a grand or petty jury of his peers, as mandated by the Constitution of the United States. He was tried away from home, away from friends and associates, away from personal and corporate records. In brief, he was tried in a place where he was least able to defend himself.

In the Southern District of New York petitioner perforce had to use a New York attorney who was unknown to petitioner and vice versa. His lead counsel was unaware of his methods of doing business, his reliance on others, his mental processes, and defenses which a Florida attorney would have known and used. For example, a Florida attorney would have disclaimed any control status for Wolfson in Continental Company, since Wolfson apparently did not participate in that management; and there was a very real question of fact whether Wolfson in the absence of a Management and Control exercise, was really a control person where shares needed to be registered before they could be sold.

What was so magic about New York as the situs of the Continental and Merritt Cases? And why did the Government insist on an unpredented third trial even after two New York juries failed to convict in the Merritt Case?

Wolfson recalls that, when he first employed attorneys William Bittman and Austin Mittler to represent him they went to see Assistant Attorney General Henry A. Peterson, one of the long-time Justice Department lawyers. Since both Bittman and Mittler had been Justice Department attorneys, they knew Peterson and wanted to see if he could give them some feel of the Merritt Case.

"They told me that Peterson said he had been opposed to the Merritt indictment and didn't think it ever should have been brought," petitioner says. "Later, after the reversal of the conviction in the first trial, they talked to Peterson again, asking him why the department was so determined to pursue the case. And Peterson told them: 'If Wolfson didn't criticize this department and the judiciary, he wouldn't be tried.'"

Petitioner was tried a second time in the Merritt Case. The trial lasted from April 17 until May 8, 1972, and ended in a hung jury.

Pursuing its vendetta to the end, the Government tried petitioner a third time, from September 19 to October 9, 1972. Again there was a hung jury. This time the jury was 11 to 1 for acquittal on one count and 8 to 4 for acquittal on the other. According to every precedent in New York, and elsewhere, this should have ended the matter.

But it did not. The Government was determined to continue to make petitioner stand trial, time after time after time, until it got a conviction. The Government made known its determination to try Wolfson a fourth time on the Merritt charges. This decision was in irreconcilable conflict with a policy enunciated in Brooklyn Federal Court at this very time. On September 29, 1972, while the third Wolfson trial was in progress, Judge John J. Dooling, Jr. dismissed an indictment against an accused narcotics peddler whom the government had twice failed to convict. Though narcotics trafficking represented a crime far more serious than

anything of which Wolfson had ever been accused, Judge Dooling ruled that a third trial after two failures would represent "double jeopardy."

There was obviously one rule for an accused narcotics peddler and another for petitioner. Why? The answer seems obvious: a junkie merely commits a heinous crime; a critic damages lofty and powerful egos.

Edward Bennett Williams, who defended petitioner in the 2nd and 3rd Merritt trials, followed Bittman and Mittler's footsteps to the Justice Department to see what he could find out. He came back and reported the following to petitioner that this is what he was told:

> Ed, we wouldn't try this again but Wolfson is attacking this department. We have to try it.

Williams said to petitioner that the Department of Justice "can try you a hundred times and they will, though in my opinion they can never get a conviction." The crime, in other words, lay not in committing a crime but in lese majeste to Big Brother. Even Williams felt it was hopeless to go back into court again. Finally, at Williams' urging and to avoid a further trial, petitioner accepted a deal: a nolo contendere with an understanding that there would be no prison term.

What more can or need be said about selective prosecution?

PART XI

JUDICIAL BIAS AND PREJUDICE

Returning now to the Continental Case, we have seen not only selective prosecution on the bringing of the indictment on the part of the Government, we shall also now attempt to demonstrate a

fatal bias and prejudice on the part of the judge who presided over the trial.

A. The Law

There are strict limits on the trial judge's power to intervene in the conduct of a trial. Especially, a judge must not communicate to the jury an opinion on the guilt or innocence of the accused, as this is totally inconsistent with notions of a fair trial. United States v. Tyminski, 418 F.2d 1060, 1062 (2nd Cir. 1969), cert. den. 397 U.S. 1075 (1970); Cinderella Career & Finishing Schools v. FTC, 138 App. D.C. 152, 452 F.2d 583 (D.C. Cir. 1970); Whitaker v. McLean, 73 App. D.C. 259, 118 F.2d 596 (D.C. Cir. 1941); Bursten v. United States, 395 F.2d 976, 983 (5th Cir. 1968); United States v. Bukowski, 435 F.2d 1094, 1109 (7th Cir. 1970), cert. denied, 401 U.S. 911 (1971); Note, Disqualification of Judges for Bias in the Federal Courts, 79 Harv. L. Rev. 1435 (1966).

B. Bias and Prejudice at Trial

In an attempt to have Judge Palmieri to recuse himself from sitting on the Merritt Case, petitioner filed a lengthy affidavit of bias and prejudice, dated May 8, 1968. This affidavit covers in detail the points to be covered in the section; the affidavit is reproduced in its entirety as Exhibit XI(A) attached hereto; and petitioner urges the Court to read it in its entirety. However, there are certain parts of it which are particularly pertinent and the following paragraphs are taken bodily from that affidavit, beginning on p. 11 thereof:

[The] Court's attitude toward the ultimate issue in the Continental Case can be gathered from his comment to counsel in a side-bar conference where it said, indicating a belief in our guilt, "Assuming very charitably that these alleged neophytes blundered into a mistake..." (Tr. 1890).

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The Court even more explicitly indicated its belief as to our guilt and improper motivations when it stated at the conclusion of the Government's case, "It is clear to me that what they allegedly did and what the proof indicates they did is contrary to the purpose and spirit of the law." (Tr. 1150). It reached this conviction about our guilt even though it recognized that the law "was lacking either in its explicit provisions or lacking in its terms so as to make it readily enforceable." (Tr. 1150).

During the testimony of Arvin Rotchschild, a key witness, [the] Court repeatedly pressed the witness as to whether his testimony was an "accurate, truthful reply", or an "accurate, forthright reply". (Tr. 1344-1346).

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Moreover, in referring to Propel-Pak (to which Continental owned patent rights) this Court observed that "this aerosol product is being injected into the case as the great vehicle which was going to make this company the great company that it didn't become." (Tr. 1363). Furthermore, with respect to whether the facts concerning Propel-Pack were admissible for the purpose of showing what merits might have been disclosed by a registration statement, this Court dismissed the matter with: "What the Government better start doing is prepare a medal with appropriate ribbons to award your client." (Tr. 897).

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During affiant Gerbert's testimony, [the] Court repeatedly intervened to summarize the witness' testimony in a disbelieving fashion. After affiant testified how he had begun using additional brokers, the Court observed: "You were just trying to be friendly with everybody and it was a fortuitous situation" which resulted in the change. (Tr. 1832).

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Nor did the character witnesses who testified on affiants' behalf escape [the] Court's censure. In a conference with counsel, [the] Court disparagingly referred to the character witnesses as "Joe DiMaggio, Sid Luckman and Company". (Tr. 1873). And with respect to one such witness, the Court sought to forestall the effectiveness of the testimony by permitting improper cross-examination and when an objection was made it observed "Here you have a very good looking impressive gentleman, Governor of the whole State of Florida, who testified in a centurion

voice, and makes a fantastic impression on the jury. You bring in a couple more witnesses like this and the prosecution might as well close up and leave the courthouse." (Tr. 1434).

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Affiant Wolfson was repeatedly the victim of the Court's obvious prejudice against him. Believing that it had found an inconsistency in affiant Wolfson's testimony, [the] Court stubbornly badgered the witness, over and over again, asking whether he was testifying that day in a fashion inconsistent with his prior testimony, repeatedly emphasizing in words "today" and "yesterday." (Tr. 2099-2100).

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Nor did [the] Court hide its attitude from the jury. After government counsel had questioned affiant Wolfson with respect to his knowledge of the 1933 Act, the Court intervened with "and I suppose your answer would be the same with respect to the regulations as well." (Tr. 2115).

****

In sum, [the] Court made clear both before the jury and out of the jury's presence that he did not regard the affiants either as truthful witnesses or as persons caught in the web of an exceedingly unclear law. Needless to say, cold print fails woefully to capture the tone of Judge Palmieri's voice or his facial expressions while delivering himself of the above-quoted comments.

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Judge Palmieri's bias against us is further reflected in the contrasting consideration he gave to a government witness and to our character witnesses. The government called one Rittmaster as a witness and the Court precluded our counsel from examining him concerning his indictment in the Merritt-Chapman case. The Judge excluded such testimony on the ground that it would be contrary to the presumption of innocence. Yet, when he called character witnesses in our behalf, Judge Palmieri permitted the government to ask them whether they knew that we had been indicted for fraud in the Merritt-Chapman case. Needless to say, this was less than even-handed justice.

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Pursuant to Section 455 of Title 28, United States Code, we believe that in the interest of justice [the] Court should recuse himself by reason of its relationship with Paul Galvani, one of the two prosecutors assigned to this case. Until September 16, 1966, three days before the return of the Continental indictment and barely one month prior to the return of the present indictment, Mr. Galvani was law secretary to the Honorable Edmund L. Palmieri, and had served in that capacity for two years. Although in the ordinary situation there is no prohibition against a former law clerk's practicing before "his" judge, the present case is far from an ordinary one.

C. Bias and Prejudice Illustrated by Sentence Imposed

Petitioner was sentenced to a year in prison, the maximum fine on each count (totalling $100,000.00) and the costs of prosecution, a truly unprecedented sentence for a fraudless, first offense by a reputable businessman/philanthropist. As Exhibit X(A) illustrates, virtually no indictments are brought for technical breaches of the law under Section 5 of the Act of 1933. And even where civil cases are brought, fines of this magnitude are almost never imposed. Why the excessive sentence imposed by Judge Palmieri?

One answer which leaps to the mind is that Judge Palmieri, for whatever reason, formed a personal bias and prejudice against petitioner, as illustrated above at some length.

However, one factor in this bias and prejudice may lie in the fact that petitioner insisted upon exercising his Constitutional right to a trial. He refused to cop a plea.

It is known (and deplored) that some judges mete out stiffer sentences to those who insist on a trial than upon those who are charged with similar offenses but who plead guilty to one or more offenses. Normally, this can be demonstrated, if at all, by statistics. However, with respect to Judge Palmieri, there are quotations from the bench to prove the point. The case of Carmelo Sansone is illustrative.

Carmelo Sansone was indicted August 21, 1951 on narcotics charges and went to trial before District Judge Sidney Sugarman in February, 1952. His conviction in that trial was later reversed by the Court of Appeals and re-assigned to Judge Palmieri. The retrial was held from September 20-24, 1954, before a jury which found him guilty. On Page 573 of this trial transcript, Judge Palmieri told the jurors, "I feel that your verdict was justified by the evidence." On Page 582 of the transcript, when

Sansone appeared for sentencing the Judge said, "If he had pleaded guilty to the charge and had not put the government to the expense and risk and trouble of a prosecution, I might very well suspend sentence... I, therefore, sentence you to serve one year in jail." In other words, Sansone was sent to jail for a year because he put the Government "to expense and risk and trouble of a prosecution." [Crim. No. 136/148].

As Sansone's conviction was for a narcotics violation, it might be instructive to compare petitioner's case, not with Sansone's, but with that of Alfred M. Lerner. He was a former president of the defunct First Hanover Corporation. He was indicted twice in July, 1959, for securities violations, including fraud, secret stock schemes, margins, and stock credits; and on August 5th entered pleas of not guilty in both indictments before Judge Palmieri. Between the time of filing the plea and the following July, the defense and the Government quite obviously made a deal. On July 10, 1970, Lerner withdrew his not guilty plea, entered a plea of guilty to Count One of the indictment in case #69/587. On August 21, he paid a fine of $500.00 and the Government dismissed counts 2 and 3. On September 9, 1970, Lerner withdrew his not guilty plea in the second indictment, #69/577, and entered a plea of "GUILTY WITHOUT KNOWLEDGE". Then he was sentenced to pay a $2,500.00 fine on two counts of indictment; the other seven were dismissed by the Government. All in all, by avoiding a trial he avoided a jail sentence, and his total fine was $5,500.00 on both indictments combined.

Attention is directed to the contrast of justice in Lerner's case and that in the Wolfson cases. Both Wolfson convictions, Continental and Merritt, included prison sentences, large fines, and Court costs, all meted out by the same Judge who dealt so leniently in these Lerner cases. All this despite the fact that no charges of fraud existed in the Continental case. However, Wolfson demanded a jury trial.

D. Bias and Prejudice Illustrated by Excessive Bail

After petitioner's conviction in the Continental case, the Government asked that bond be set an unprecedented $1,000,000.00. As there was no indication whatever that petitioner would flee the jurisdiction or do any of the acts which warrant high bail, the only explanation would appear to be that the Government merely wanted to embarrass petitioner further... to make him appear in the eyes of the public as an habitual, hardened criminal.

Again, for whatever reason, the Court actually set the bond at $850,000.00, yet totally unsecured. A rather exhaustive investigation of all criminal cases in Judge Palmieri's court from his appointment in 1954 through 1968 reveals no case in which the amount exceeded $150,000.00, except petitioner's. 5/

5/ Compare the following examples with the bond set in petitioner's case:

On August 18, 1954, Sam Gurtsky and Edward Argenio were arrested for alleged unlawful sale of heroin. Judge Palmieri set bail at $7,500.

On Sept. 24, 1954, Carmelo Sansone was sentenced to imprisonment for one year for the unlawful sale and conspiracy to sell narcotics. Pending appeal, he was released on $2,000 bail. The Government moved to increase bail, but Judge Palmieri denied the motion.

On July 20, 1955, Judge Palmieri set bail at $1,500 in the case of Albert F. Calabrese, et al, charged with unlawfully possessing heroin, unlawfully distributing and dispensing heroin, and conspiracy to violate narcotics law.

On August 4, 1958, John Salvietti and Joseph Consalvo were released on bail of $7,500 by Judge Palmieri after being charged with unlawful sale of heroin and conspiracy.

In identical charges, Judge Palmieri on March 9, 1959, set bail for Frank Russo at $10,000, then on March 10, 1959 reduced his bail to $6,000.

The same charges were filed against George Carbo, and on April 3, 1959, Judge Palmieri set bail at $2,000.

Vincent Zambardi was sentenced to five year imprisonment by Judge Palmieri on July 7, 1959, for the unlawful sale of heroin and conspiracy. Pending appeal, his bail was set at $3,500.

Charges of an unlawful conspiracy to violate U.S. narcotics laws were filed aginast Charles DiPalermo, Vito Genovese, John Ormento, et al. On August 8, 1958, Judge Palmieri set bail for DiPalermo at $15,000, and on March 31, 1959, he set bail at $150,000 for Ormento.

5/ (continued)

On November 23, 1959, Judge Palmieri set bail at $3,000 for Felix Marzan, charged with unlawful sale of heroin. Bail was reduced to $1,500 on December 1, 1959.

On April 21, 1966, John Dioguardia (the well-known "Johnny Dio") was indicted for bankcruptcy fraud, along with his brother Dominick and Thomas Plumeri. Judge Palmieri set bonds that caused eyebrow raising:

(a) Dominick, $500 bond
(b) Plumeri, $3,000 bond
(c) Johnny Dio, who once was involved in the acid blinding of columnist Victor Reisel, a bond of $15,500 -- and Judge Palmieri took the extraordinary action of releasing him on the day of his arrest until 5:00 p.m. to give him time to raise bail.

On June 19, 1969, the New York Daily News reported the indictment on five counts against former customs agent Michael J. Cassotta for conspiracy in connection with a pornography smuggling ring. Also arrested in the same case was Charles (The Blade) Tourine. Cassotta pleaded not guilty and was released without bail by Judge Palmieri.

E. Bias and Prejudice Shown by Refusal to Recuse

As was pointed out earlier (Part V), Judge Palmieri chose certain persons (including McRitchie) for the grand jury wheel, then he empanelled the "Wolfson grand jury", then he chose McRitchie as its foreman, and, last, he elected or was selected to preside over the first Wolfson trial, i.e., the Continental Case. As we have indicated above, Judge Palmieri showed demonstrable bias and prejudice not only during the trial but also in setting bond, in sentencing, and in other ways.

Thereafter, Judge Palmieri elected or was selected to serve as trial judge in the Merritt Case, the indictment for which was also handed down by the same grand jury as described above. When this assignment was challenged by motion in October, 1967 and argued before Judge Palmieri in December, 1967, counsel took the position that even if the assignment was procedurally proper, the interests of justice would best be served if another judge presided over the Merritt-Chapman and Scott trial. Judge Palmieri denied this motion principally on grounds of judicial economy and for other reasons subsequently rejected by the Court of Appeals in United States v. Simon, 393 F.2d 91. On April 18, 1968, a motion was filed in Judge Palmieri's Court in support of an application by defendant Wolfson for an order referring Mr. Wolfson's second case, the Merritt Case, back to the Chief Judge of the United States District Court for the Southern District of New York, for re-assignment of this case to a judge other than Judge Palmieri in accordance with the principles enunciated by the Second Circuit Court of Appeals on April 17, 1968, in the case of United States v. Simon, supra. On April 24, 1968, Judge Palmieri granted defense attorneys time to plead in behalf of this motion. The motion was accompanied by a lengthy, detailed affidavit of bias and prejudice [See Exhibit XI(A), attached hereto.] Upon the conclusion of the attorney's pleadings, and

with no delay whatsoever, Judge Palmieri denied the motion orally and in writing simultaneously. Needless to say, all defense attorneys involved were amazed that their motion for re-assignment was so hastily denied since they had presented what they felt were creditable reasons why Judge Palmieri should recuse himself since he had presided in Mr. Wolfson's first trial which resulted in a conviction.

With twenty four judges sitting in the Southern District at the same time, one would have thought that Judge Palmieri would have wished to recuse himself to avoid even the appearance of bias and prejudice, even if no actual bias or prejudice existed. And as to "judicial economy", the first Merritt Case resulted in a conviction that was so conducted that it was reversed on appeal (and thereafter subjected to two further jury trials).

Subsequently, while he was presiding over the Merritt Case, Judge Palmieri said: "I have nothing to do with the facts of this case. I had the misfortune of being assigned to it." If it was a "misfortune" from Judge Palmieri's point of view, why not recuse himself when asked, particularly after the reluctant filing of a lengthy affidavit of bias and prejudice by petitioner who believed he could not receive a fair trial in Judge Palmieri's Court.

In this regard, petitioner shall seek the Court's permission to address certain interrogatories to Judge Palmieri re (1) his empanelling of the grand jury; (2) his selection of McRitchie as foreman; and (3) his election or selection as trial judge over both the indictments handed down by the grand jury.

F. Bias and Prejudice Shown by Attitude Toward Petitioner's Health

Petitioner suffered a heart attack on March 5, 1966. On August 19, 1966, he appeard before a grand jury, despite the

urging of his physicians that it would jeopardize his health to do so. He was tried in the Continental Case in the fall of 1967, and was sentenced in November of that year. While his case was on appeal, he returned to his home in Florida, to attempt to ameliorate his deteriorating health.

When Judge Palmieri announced an early trial date for the Merritt Case, petitioner's attorneys sought a continuance. On February 26, 1968, as shown in the stenographic minutes of Judge Palmieri's court [For excerpts from 66 Cr. 832 see Exhibit XI(B), attached hereto] on pages 155 through 158, Mr. Wolfson's attorneys requested that he be examined by a physician of the Government's choosing in Florida so that Mr. Wolfson would not have to make the long train trip from Miami, to New York, for the medical examination that all agreed should be conducted. This request was denied by Judge Palmieri on Page 158. Petitioner was forced to return to New York, simply in order that a doctor of the Government's choosing could examine him there. Oddly enough, when Judge Palmieri later sentenced petitioner in the Merritt Case, he vehemently denied the whole business, saying specifically: "The Government and the Court never refused to have you examined by a Government doctor in Florida." [For page 44 of the Transcript of December 6, 1968, see Exhibit XI(C) attached hereto.][6/]

G. Wanton Disregard of Health of Petitioner's Wife

Not only was petitioner's health bad during the Continental

6/ Treatment of petitioner should be compared with treatment given to Frank Costello. The trial at which the Government would attempt to take away Costello's United States citizenship and deport him, was supposed to take place on June 11, 1956, but Judge Palmieri granted a delay so that Costello could obtain a new lawyer. On September 4, 1956, Costello requested a further delay due to a heart condition. Judge Palmieri granted the delay.

and Merritt Cases, the health of his wife was also very bad. In fact, by December of 1967, she was critically ill. Sentencing of Mr. Wolfson by Judge Palmieri in the Merritt Case was scheduled for December 6, 1968. On December 2, 1968, the Judge was advised of the critical illness of Mrs. Wolfson and specifically requested to postpone sentencing. The Judge's law clerk was advised on December 3, 1968, that there had been no significant change in Mrs. Wolfson's condition, and a request was made to inform the Judge that Mr. Wolfson did not want to leave his wife's side during this critical time. Late during the afternoon of December 3rd Mr. Wolfson's attorney was told that the Judge would not postpone the sentencing. Wolfson took the train for New York, where sentencing was pronounced on December 6th. When Mrs. Wolfson learned of the sentencing late that evening, her condition became progressively worsened. Her nurse reported to the family that she went into shock after seeing the newspaper reports of the sentencing. She was taken to the hospital on the night of December 7th, just after petitioner's return to Miami, and passed away a few hours later. The judgment in the first Merritt trial had taken place on the 8th day of August, 1968, and it was on appeal. Therefore, there was no urgen y about the sentencing. A few days or weeks would not have mattered. Yet, despite everything, Judge Palmieri insisted that petitioner leave his critically ill wife and come to New York, on December 6th. This can only be described as wanton bias and prejudice -- if not wanton and needless cruelty.

PART XII

CONCLUSION

In summary, petitioner, being fully aware of the seriousness of the charges made herein, asserts that from start to finish his prosecution was impermissibly discriminatory in nature and, hence, fatally void. He charges with equal seriousness that the purpose or motive of the prosecution was also improper and, hence, the prosecution was also fatally defective for this reason. Petitioner asks the Court to look not at a single item in his litany but to examine the totality of the circumstance in order to judge whether his constitutionally guaranteed rights to due process and a fair trial have not been most seriously breached.

Beginning at the beginning, petitioner has pointed out in some detail that the Government insisted upon a grand jury investigation and trial in New York, at best a place with only a secondary connection with the alleged crime, but a place in which petitioner would be at a great disadvantage in defending himself and proving his innocence.

And does not the handling of that grand jury indicate that petitioner's contentions may have great merit? The foreman of the grand jury was apparently personally selected by the trial judge; and it turns out that the foreman was a life long and intimate friend of the Assistant U.S. Attorney who presented the case, as well as a close friend of the U.S. Attorney himself. To say the least, are these not extraordinary circumstances in any case? To ascertain their exact significance more clearly, petitioner is asking access to the grand jury minutes, as well as the Court's approval for him to direct certain interrogatories to the foreman of the grand jury that indicted him.

And the discriminatory process carried straight over into the trial. Witnesses were threatened. Perjured testimony was used. Potentially exculpatory evidence was not only withheld then but also now. Petitioner is asking the Court's approval to direct certain interrogatories to S.E.C. Investigator Stuart Allen and to S.E.C. Chief File Clerk Tom Huston.

As to the constitutionally guaranteed right to effective assistance of counsel, petitioner has detailed that his long-time attorney, under threat of subpoena, testified before the grand jury; he has joined petitioner in asking the Court to make available to petitioner the grand jury minutes relating to his testimony; it should be noted that this attorney was named as an unindicted co-conspirator in the companion Merritt Case. As to the lead defense attorney, petitioner pointed out a number of mysterious lapses in his performance. To get at the cause of his conduct of the defense, petitioner asks the Court to order, for the Court's in camera inspection, a criminal reference report against this lead attorney which petitioner believes was pending at the time of his own defense and trial.

And there is the question of conflicts of interest. In addition to the foreman of the grand jury, there is the matter of the bitter conflict between prosecutor Grand's family and petitioner's family and associates. And there is the fact that prosecutor Galvani had been the trial judge's clerk until a very few days prior to the indictment. And defense attorney Liman (in the companion Merritt Case) was simultaneously a prosecutor in an S.E.C. case in the Southern District of New York.

And then there is the question of whether the prosecution of petitioner was not selective prosecution in the technical, legal sense, and hence, fatally defective? It was the only non-fraud Section 5 case to be prosecuted by the Government since

the passage of the Securities Acts in 1933 and 1934. All other non-fraud transgressors of Section 5 and Rule 154 had either not been disciplined at all, or they had been dealt with administratively or civilly.

And last but not least, petitioner believes that trial Judge Palmieri, for whatever reason, was hopelessly biased and prejudiced against him from the beginning of the Continental trial to the day of sentencing -- a bias and prejudice reinforced by his insistence upon trying petitioner in the first of the three Merritt trials. Judge Palmieri's bias and prejudice can be matched only by that shown by the U.S. Government from beginning to end, illustrated (if needs be) by a willingness to try petitioner three times in the Merritt Case and a disposition to try him a fourth time if he did not plead.

For all of these reasons, petitioner believes that he is entitled to either a new trial or to have his conviction voided and the charges dismissed. Prior to an evidentiary hearing on this petition for a writ of error coram nobis, petitioner asks the Court to grant certain procedural motions in the nature of discovery (attached hereto) in order that petitioner may perfect and supplement his petition before the Government is required to respond thereto.

Respectfully submitted:

B. Fensterwald, Jr.

BERNARD FENSTERWALD, JR.
Fensterwald & Ohlhausen
910 16th St., N.W.
Washington, D.C. 20006
Tel: (202) 223-1667

Attorney for Petitioner

Dated: _____

EXHIBIT VII(I) P.4

LAW OFFICES
GLICKSTEIN CRENSHAW GLICKSTEIN FAY & BLOCK
1205 UNIVERSAL MARION BUILDING
JACKSONVILLE, FLORIDA 32201

JOSEPH M. GLICKSTEIN
MCCARTHY CRENSHAW
JOSEPH M. GLICKSTEIN JR
LAWRENCE D. FAY
J. EDWARD ALLEN (1926-1972)
BYRON B. BLOCK
HUGH S. GLICKSTEIN
ARNOLD H. SLOTT
MCCARTHY CRENSHAW JR
THOMAS C. DEARING

MAILING ADDRESS
P.O. BOX 1088
CABLE ADDRESS
"JOMAC"
TELEPHONE
354-9026
AREA CODE 904

September 24, 1974.

Bernard Fensterwald, Jr., Esquire
Fensterwald and Ohlhausen
910 Sixteenth Street, N. W.
Washington, D. C. 20006

Dear Mr. Fensterwald:

This will acknowledge receipt of your letter of the 10th inst.

Replying thereto, as well as in further reply to your letter of the 12th ultimo:

(1) The place of my appearance before the Grand Jury was the Federal Courthouse in Foley Square, New York City. I have no independent recollection of the date but believe it to be in August, 1966.

(2) My appearance was at the request of Assistant U.S. Attorney Michael Armstrong. It was indicated that if I did not appear, a subpoena would be issued to force my appearance.

(3) I discussed the situation with Mr. Gould in advance of my appearance.

(4) I have no independent recollection of the substance of such discussion.

(5) As I have heretofore stated, it is necessary for me to be furnished with a copy of my testimony before the Grand Jury in order to refresh my recollection as to the substance of my testimony. However, it is my best recollection, without the benefit of a copy of my said testimony, that I was searchingly interrogated with respect to a so-called "promotional" meeting at the Waldorf

EXHIBIT VII(I) P.1

GLICKSTEIN, CRENSHAW, GLICKSTEIN, FAY & BLOCK

Hotel in New York City, sponsored by a New York based advertising company claimed to have been sponsored by Continental. There were questions (a) with respect to a booklet or brochure distributed at or prior to such meeting and certain representations claimed to have been made in such booklet or brochure; (b) with respect to certain joint ventures, the names of which I do not recall; and (c) as to matters about which I have no recollection at the present time and in relation to which I will need the copy of my testimony before attempting to remember things of many years ago about a terribly emotional and traumatic experience not only to a long time personal friend and client, but also to me.

(6) As previously stated, I have no present recollection of my testimony. However, I strongly doubt that I gave any such testimony because it would not be true.

Very truly yours,

JMG:ac

EXHIBIT VII(J) P.2

United States Department of Justice

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007

ADDRESS REPLY TO "UNITED STATES ATTORNEY" AND REFER TO INITIALS AND NUMBER

DFE:emw

44509

September 12, 19

Bernard Fensterwald, Jr.
Fensterwald & Ohlhausen
910 Sixteenth Street, N.W.
Washington, D. C. 20006

Re: United States v. Louis E. Wolfson

Dear Mr. Fensterwald:

I have your letter of September 10, 1974 concerning the Grand Jury testimony of Mr. Joseph Glickstein. It is my understanding that Mr. Glickstein only testified at the "Merritt-Chapman" trial as a defense witness, and therefore his Grand Jury testimony was not 3500 material.

In any event, at this juncture we could not supply you with any Grand Jury testimony in the absence of a court order. Although you are free to move for such an order, we anticipate that we would oppose.

Very truly yours,

PAUL J. CURRAN
United States Attorney

By: Douglas F. Eaton
DOUGLAS F. EATON
Telephone: (212) 264-6434

EXHIBIT VII(F) P.1

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs. NO. 66 Cr. 832

LOUIS E. WOLFSON, et al.,

Defendants.

CONSENT OF JOSEPH M. GLICKSTEIN TO THE RELEASE OF CERTIFIED COPIES OF A TRANSCRIPT OF HIS TESTIMONY BEFORE THE GRAND JURY IN THE ABOVE ENTITLED MATTER

Comes now the undersigned, JOSEPH M. GLICKSTEIN, who practices law in the City of Jacksonville, Florida, as a member of the law firm of Glickstein, Crenshaw, Glickstein, Fay & Block, 1205 Universal Marion Building, Jacksonville, Florida, 32202, and who is 76 years of age, and respectfully shows unto this Honorable Court that:

1. On or about the 18th day of September, 1966, the undersigned appeared and testified as a witness before the Grand Jury which returned the indictment in the above entitled matter against the defendant, LOUIS E. WOLFSON, and another, charging them with a conspiracy to commit certain offenses against the United States, to-wit: violations of §§ 77e(a) and 77x of Title 15, United States Code, and §§ 2 and 371, Title 18, United States Code;

2. Mr. Wolfson was subsequently convicted and served a term in prison;

3. The undersigned is advised that Mr. Wolfson intends to file a Writ of Error Coram Nobis in an attempt to set aside said conviction;

4. Legal counsel for Louis E. Wolfson in charge of preparing the proposed Writ of Error Coram Nobis has requested the

undersigned to furnish such counsel with the substance of his testimony before said Grand Jury, but because of the passage of time and lack of notes, the undersigned is unable to recall much of the testimony of the undersigned before said Grand Jury;

5. The undersigned believes that the interest of justice will be promoted by the entry of an order of this Court directing the Clerk of this Court to cause to be made two (2) certified copies of the said testimony of the undersigned before said Grand Jury (upon the payment of all lawful costs therefor by the undersigned and Mr. Wolfson) and to deliver one of said certified copies thereof to the undersigned and one of said copies thereof to Mr. Wolfson or his counsel; and

6. The undersigned hereby consents to the entry of said order by this Court.

Joseph M. Glickstein

STATE OF FLORIDA)
) SS
COUNTY OF DUVAL)

Before me personally appeared JOSEPH M. GLICKSTEIN, to me well known and known to me to be the individual described in and who executed the foregoing instrument, and acknowledged to and before me that he executed the same for the purposes therein expressed.

WITNESS my hand and official seal this 22d day of April, 1975, at Jacksonville, County and State aforesaid.

Notary Public, State of Florida
My comm. expires: 9/2/78

COMPARISON OF SWORN TESTIMONY OF JOHN J. MORLEY BEFORE THE S.E.C. OCTOBER 18, 1965, AND ON THE WITNESS STAND SEPTEMBER 12 AND 13, 1967, IN THE CASE OF U.S.A. v. LOUIS E. WOLFSON, ET AL, AND CERTAIN DOCUMENTS BY PETITIONER RELATING THERETO

EXHIBIT [illegible]

Page numbers refer to the official S.E.C. Transcript of the October 19, 1965 session and the Trial Transcript on September 12 and 13, 1967.

OCTOBER 1965	SEPTEMBER 1967
"The Edith Edwards--the funny thing about the Wolfson accounts, it was a tender sensitive subject to handle. Brothers and sisters did not want brothers and sisters to know what they might be doing in the stock market, and Edith Edwards is a widow, and she doesn't know anything about control or stock, and I believe she bought that stock through us, and if each member could sell a given number of shares within that period, and I would be all right in accepting those orders if that was my sincere belief at that particular time that long ago--I might have been knowing that Edith Edwards, while the sister of Louis Wolfson--you would be making an awful long stretch to show her as a controlled individual.	"Edith Edwards used to place some of her own orders on investment-type stocks, but on big, substantial orders, either Mr. Wolfson or Mr. Gerbert placed those orders." [Page 376].
"She was a widow. She had this stock and she did not know what Louis was doing and he didn't know what his sister was doing." [Page 68].	* * * * * *
* * * * * *	"How about 4J, the account of Edith Edwards? [Page 376].
"... and I would not personally consider Edith Edwards as a member of the group." [Page 72].	"A. To the best of my recollection, that would come from Mr. Gerbert." [Page 423].
* * * * * *	* * * * * *
"I don't think Edith Edwards in my opinion belongs in that group." [Page 81].	"Mrs. Edwards placed orders for her investment-type stocks in there, but when substantial orders came in for her account they were over the years entered by Mr. Wolfson or Mr. Gerbert." [Page 424].

[Further comment by petitioner: Morley stated in his testimony that Lou Wolfson placed orders for Mrs. Edith Edwards. There is a sworn affidavit (See Exhibit __) signed by Mrs. Edwards to the effect that Lou Wolfson has never given an order to Morley, either as an agent for A.M. Kidder Co. or as an agent for Reynolds & Co. or any other broker, for the sale of any stock owned by her.]

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EXHIBIT 103 P.2

OCTOBER 1965

"Were you aware at this time, in 1961, that Mr. Louis Wolfson had previously been in difficulty with the S.E.C., that the S.E.C. would have to bring an injunction against him in connection with stock in American Motors Company?

"A. Yes, we were not involved in that anyway.

"Mr. Allen: You say you were not involved. Did you carry accounts at that time for Mr. Wolfson?

"The Witness: American Motors was done through other houses, not us." [Page 86]

SEPTEMBER 1967

"I told Mr. Wolfson that the Dow Jones ticker just carried an article announcing that William Shea and Martin Segal were elected to the board of American Motors as his representatives, and told him that I had received a call from our partner in New York instructing me to accept no more sell orders in American Motors from Mr. Wolfson nor his family.

"Mr. Wolfson asked me who gave me those instructions. I told him it was our partner and our lawyers in New York.

"He asked me if I thought that our lawyers were better than his lawyers and I told him no, but that we were a regulated industry and that we had to do what our lawyers told us to do because the penalty on the broker was very severe." [Page 383]

[Petitioner's further comment: Pages 384, 385, and 386 all dealt with witness Morley's direct connection with Mr. Wolfson in the handling of American Motors stock, in direct contradiction to Morley's 1965 testimony.]

103A

EXHIBIT IX(·) ·.3

OCTOBER 1965

"Q. My question is: Why didn't you get such a letter from Mr. Gerbert with respect to Continental Enterprises stock?

"A. Well, I was -- I learned as I went along, I didn't know it all, and it is possible that in my own mind that these over the counter transactions did not have to be checked when the sellers were so far apart, Children's trusts, Widow's, and others. I did know that on the big board that we were always very, very careful, and on the over the counter there we did sell, but there were a number of sellers and it might be a matter of opinion whether all of them were controlled people." [Page 70-71].

SEPTEMBER 1967

"Over the counter stocks, the rule was a simple one, 1 per cent could be sold in a six-month period, within a six-month period, providing no stock had been sold within six months." [Page 390].

* * * * * * * *

"THE COURT: Will you be good enough to amend your answer and tell us whether or not you referred to the rule or discussed the rule?

"A. I don't recall discussing the group covered by the rule with the individual...." [Page 391]

* * * * * * * *

"Q. I am not asking you, Mr. Morley, whether you discussed the specific names but did you discuss generically the type of person covered by the prohibition?

"A. Yes, sir.

"Q. And what did you say in talking to the defendants?

"A. That any officer, director or member of the Wolfson family were restricted to comply to Rule 154 when they entered sell orders in control companies.

"I hope I understand the question." [Page 392]

EXHIBIT IX(-) P.4

OCTOBER 1965

"And now Continental Enterprises, I might have been a bit lax there for a period, but that was scattered among quite a few people, and I might have over-sold a bit, even if I did check. I over-sold 1,000 shares, if they are in the control group.

"Q. Are you saying in your mind at this time there was some differences --

"A. In my own mind, Yes, perhaps. I knew that." [Page 71].

105A

SEPTEMBER 1967

"Q. Can you tell the Court and jury what those conversations were?

"A. Mr. Gerbert called me and said he wanted to sell through us 10,000 shares of Continental Enterprises, could I accept the order.

"I told him that I would have to check with New York to see if it was acceptable under the SEC rules and I would want him, asked him if he had sold any stock in the last six months.

"I checked with New York and I told him that he had told me he had sold no stock in the last year and I called him back and told him that New York said that I could accept that order from him providing that he put it in writing.

"Q. Then what happened?

"A. He put it in writing and I executed the order.

"Q. Specifically who wrote the body of this memorandum, sir?

"A. I did.

"Q. The signature on the bottom, who wrote that?

"A. Mr. Gerbert." [Page 429]

EXHIBIT IX(-) p. 5

OCTOBER 1965

"The rule, as I saw it, said that each member of a controlling group may in a six-month period sell the largest weekly volume four weeks preceding or one per cent of the outstanding stock, whichever was the lesser....." [Page 37].

* * * * * * * *

"... and signed, E.B. Gerbert, and I ask you if you recall if you received this letter from Mr. Gerbert in relation to his sales of Universal Marion Corporation stock?

"A. He wanted to sell some stock without a doubt and I had to get this letter to cover it.

"Q. And that letter was to protect yourself to insure that Mr. Gerbert was complying with Rule 154, is that right? [Page 69].

106A

SEPTEMBER 1967

"A. The 1 per cent rule is a part of Rule 154 of the Securities and Exchange Act of 1933. It spells out the amount of share that can be sold over the counter by a person in control or an officer or director of an over-the-counter company, within one six-month period.

"Q. It is limited, is it not, to over-the-counter transactions?

"A. The 1 per cent rule is limited to over-the-counter transactions. That is my understanding.

"Q. It has nothing to do has it, sir, with transactions on a national exchange, the 1 per cent rule I mean?

"A. The 1 per cent rule has nothing to do with listed securities except on a listed exchange the rule says, 154, that you may sell 1 per cent on a listed exchange or the largest volume in the four preceding weeks that the order is received, whichever is the lesser.

"Q. So that you say now there is a 1 per cent rule on the listed securities? [Page 473].

* * * * * * * *

"A. It is never referred to, I never heard it referred to as a 1 per cent rule." [Page 474].

* * * * * * * *

"A. No, sir. The 1 per cent rule on the list -- you were limited always on 1 per cent on over-the-counter. There was a difference on the amount you could sell on the big board, as I explained." [Page 537].

EXHIBIT 155(-) P.5

OCTOBER 1965

"The Witness: I would have to ask them, that's right, because our records showed no sales in our office. There were no other sales in our office, and that is what I was mainly concerned with that we would not go over at any time. And you showed me where I did go over 1,000." [Page 81].

SEPTEMBER 1967

"Q. And now, sir, do you remember how many shares you sold in January, 1955, for Mr. Cecil Wolfson?

"A. Is it possible 75,000?

"Q. 75,000?

"A. I said 'Is it possible?' I don't remember.

"Q. Don't you have any recollections?

"A. No.

"Q. I hand you now the confirmations, and I will give you either the choice of adding them up yourself or I will suggest a number to you, because it's been done here, and I suggest that the number that you sold over the period of approximately two months for Mr. Cecil Wolfson was 41,541 shares, isn't that right, sir?" [Page 479].

* * * * * * * * *

"Q. Now, it is clear, is it not, that in January and February, 1955, Rule 154 was in effect?

"A. It was, sir.

"Q. No question about it?

"A. No.

EXHIBIT (XX-?) P.7

OCTOBER 1965 SEPTEMBER 1967

"Q. Did you ask Mr. Cecil Wolfson for any l tter or communication or representation of any kind?

"A. I don't remember.

"Q. Do you have anything from him -- in all the files of A. M. Kidder, do you have a single piece of paper from Mr. Cecil Wolfson like the pieces of paper you produced here, anything like them, as to what he sold and what he was going to do?

"A. No, sir.

"Q. You don't have it, do you?

"A. I don't know whether I could get it, but I don't have it.

"Q. Well, sir, you try to find it and if you can bring it we will be glad to see it. Do you remember ever asking Mr. Cecil Wolfson for any proof that this sale of 45,000 shares was within the 1 per cent rule?

"A. No, sir." [Page 483].

[Petitioner's further comment: Pages 484 through 488 of the trial transcipt witness Morley admitted sales and trades in the stock by members of the Wolfson family with no questioning asked by Kidder's New York office. On Page 490 witness Morley admitted clearly that even though Mr. Cecil Wolfson was a "big operator" his transactions were never cleared with the New York office.]

V801

EXHIBIT IX(-) P.A

OCTOBER 1965

"A. I would say it was a Wolfson company, yes. [Referring to the birth of Continental in 1954, Morley admitted knowing that Continental was a "Wolfson company."] [Page 51].

SEPTEMBER 1967

"Q. So you knew that there was a group of people called Wolfson who controlled Continental in 1955?

"A. Yes, sir.

"Q. Isn't that right?

"A. Yes, sir." [Page 486].

* * * * * * * *

"A. No. There was a period when Continental was first distributed in 1955, 1954, that it is possible that it wasn't looked upon at that particular time as a controlled situation by our firm." [Page 498].

* * * * * * * *

".... Wolfson's office was in the Florida Theatre Building, and they changed their attitude and said, 'This is now a controlled situation and it will be subject to the 1 per cent.'" [Page 499].

* * * * * * * *

"Q. You mean there was a different rule in 1954, September 1954?

"A. In September 1954 Continental Enterprises was not as restricted as it has been since the period that I told you, 1961, 1962. You will never find a violation after that period.

"In those other periods there was no solid agreement, no -- wasn't thrown in there." [Page 568].

EXHIBIT 16(-) F.C

OCTOBER 1965 SEPTEMBER 1967

"Q. Do you know what those are, sir, just in a general way?

"A. Yes, sir. Those are sales of Continental Enterprises stock for Mr. Louis E. Wolfson.

"Q. And the Wolfson Family Foundation, right?

"A. Yes, sir.

"Q. And the Wolfson trusts, right?

"A. Yes, sir.

"Q. All in the period from September 20, 1954, to December 30, 1954, right?

"A. Yes, sir. I testified yesterday that I remembered receiving substantial orders, in excess of the 1 per cent, early when this stock first came out, and I said at that time I thought the order was Mr. Wolfson's, and I thought it was very substantial and over the amount..." [Page 568].

* * * * * * * * *

"Q. ... In 1955 did you have any inkling or suspicion or belief that Wolfson and his family were controlling persons in Continental?

"A. They told me they weren't.

"A. They did tell you?

"A. Yes."

[Petitioner's Further Comment: This is obviously a deliberate lie since witness Morley previously testified that he knew Continental was controlled by the Wolfsons when it originally was "spun-off" from Capital Transit.]

110A

EXHIBIT (CC) P. 10

OCTOBER 1965

"Q. Did you ask Mr. Gerbert on these sales or Continental Enterprises in 1961?

"A. Yes, I am sure. I said 10,000 shares, I said, 'Buddy, have you sold to any place else? Are these all right?' And I said, I thought I did all of his business, I thought I did it all." [Page 94].

* * * * * *

"Q. I think I am a little confused. It is my recollection that you testified you don't recall whether or not you spoke to Mr. Gerbert about these transaction?

"A. Well, again, it is possible that I did make that check, and it is possible that I just checked with Franz to see if it is within the rules, that I accept, and it was no great substantial amount of stock it was within everything that we did in our organization we hadn't sold, I might have taken, without asking Mr. Gerbert. And I might have asked him, because.--" [Page 95].

111A

SEPTEMBER 1967

"Q. Didn't you ask him whether he sold it through other brokers?

"A. No, sir.

"Q. Did you ask him whether they intended to sell any more?

"A. No, sir.

"Q. Did you ask him whether they had any outstanding orders with other brokers?

"A. No, sir.

"Q. How could you get an answer?

"A. That was due diligence if I asked him if he had not sold with us, we could not police his actions in the other brokers." [Page 507-508].

* * * * * * * *

"Q. Didn't you assume the possibility that he might have sold stock through some other broker?

"A. No, sir.

"Q. Why not?

EXHIBIT [illegible] P.11

OCTOBER 1965 SEPTEMBER 1967

"A. A broker is not required when accepting an order from a customer to ask him if he sold stock through another broker.

"Q. You mean that wasn't part of your check, right?

"A. That's right. You don't have to ask 'Did you sell anywhere else?'

"Q. And you didn't want to know, did you? Isn't that right, you didn't want to know?

"A. I just wouldn't ask anyone if they sold stock anywhere else. With our records we know that they didn't oversell with us, so you cannot control, or I doubt that you have the right to inquire." [Pages 522-523].

112A

EXHIBIT [illegible]

OCTOBER 1965

"A. No, I couldn't. Mr. Saul Wolfson would never do another share of business with me if I told Mr. Gerbert his business." [Page 80].

SEPTEMBER 1967

"Q. Now, Mr. Morley, did one Wolfson brother know what the other Wolfson brother was doing, as far as you know?

"A. As far as I know, I would have no way of knowing whether the Wolfson brothers knew what the other brothers were doing.

"Q. Sir, did there not come times when one said to you 'Don't tell the other what I am doing'?

"A. Yes, sir.

"Q. Was that a regular attitude on their part?

"A. It was when they were trade -- remember, the Wolfsons traded in many stocks. The only trouble where we had sell orders our problems were in their own stocks. There were no problems in the dozens and dozens of companies outside of their own group. There were no problems there.

"The brothers often would not want the other brothers to know what they were doing in outside stocks.

"Q. Well, sir, did there ever come a time when one of them wanted to sell and you said 'You can't sell because your brother just sold some and he is a member of the group'?

"A. I wouldn't say that.

"Q. What would you do?

"A. I will give you a concrete example.

"Q. Yes, let's have it.

"A. Mr. Saul Wolfson called up and wanted to sell some Continental Enterprises. The limit had been sold, and I told him that there are SEC rules and regulations that govern the amount of shares that could be sold by the Wolfson group and we

113A

EXHIBIT 1-(·) p.13

OCTOBER 1965 SEPTEMBER 1967

had reached that point and I turned down his order, but I would never tell one brother what the other brother -- or who the seller was.

"Q. Well, they told you they didn't want the others to know, isn't that right?

"A. It didn't matter whether they wanted them to know or not to know. They couldn't sell control stock through us exceeding the limit, and I don't believe that you will be able to show where our firm ever exceeded the permissible limit on the big board or in Continental from '61." [Pages 543-545].

* * * * * * *

"Q. I just want you to hear the words now. Am I saying it right when I say that the brothers and sisters -- and I mean the Wolfson brothers and sisters -- the brothers and sisters did not want the other brothers and sisters to know what they might be doing in the stock market?

"A. That is a true statement.

"Q. That's right. And they told you that?

"A. Yes, sir."

EXHIBIT [illegible] P. 14

OCTOBER 1965 SEPTEMBER 1967

"Q. Well, now, for example, at this time that Mr. Saul Wolfson, I think you told us, wanted to sell twenty five or twenty-six thousand shares, did you tell Mr. Gerbert that Saul Wolfson wanted to sell that much stock?

"A. No, sir, not to my recollection." [Pages 545-546].

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[Peritioner's Further Comment: Witness Morley gave the S.E.C. specific information which indicated no conspiracy existed among the Wolfson brothers with respect to Continental sales.]

EXHIBIT 7(A)

Historical Study of Enforcement Actions By S.E.C. Annually, with Special Emphasis On Section 5 Enforcement

Year	Total Injunctions Pending	Total §5 Injunctions Pending	Total Indictments Pending	Total §5 Indictments Pending
1935-37	137	17	46	1
1938	81	30	78	0
1939	87	23	91	0
1940	69	22	113	1
1941	40	14	127	0
1942	40	13	114	0
1943	40	7	124	0
1944	32	5	110	0
1945	28	4	88	0
1946	34	7	67	0
1947	38	12	60	0
1948	42	17	52	1
1949	35	12	55	0
1950	32	11	58	1
1951	36	12	58	1
1952	44	11	55	0
1953	39	11	50	0
1954	30	5	59	0
1955	28	15	55	0
1956	45	11	54	0
1957	88	18	54	0
1958	104	28	53	0
1959	112	21	69	1
1960	143	27	100	1
1961	174	25	127	1
1962	183	28	140	1
1963	213	20	164	1
1964	180	35	155	0
TOTAL - - - -	2,154	461	2,376	10

EXHIBIT XI(A) P.1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	
v.	AFFIDAVIT
LOUIS WOLFSON, ELKIN GERBERT, JOSEPH KOSOW, ALEXANDER RITTMASTER, and MARSHALL STAUB,	66 Cr. 832
Defendants.	

STATE OF FLORIDA)
) ss:

Louis E. Wolfson and Elkin B. Gerbert, being duly sworn, say:

1. We are residents of the State of Florida and defendants in the above-captioned case. We make this affidavit in support of a motion requesting that the Honorable Edmund L. Palmieri, United States District Judge, disqualify himself from presiding at the trial of this indictment, as required by the provisions of Sections 144 and 455, Title 28, United States Code, and request further that the trial of this indictment be stayed pending final determination of this motion.

2. The Governing Statutes

a. Section 144, Title 28, United States Code, reads as follows:

§ 144. Bias or prejudice of judge.

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

HOGAN & HARTSON
815 CONNECTICUT AVENUE
WASHINGTON, D. C. 20006

b. Section 455, Title 28, United States Code, reads as follows:

§ 455. Interest of justice or judge.

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

3. Prior Proceedings:

a. The indictment in this case, 66 Cr. 832, hereinafter referred to as the Merritt-Chapman & Scott case, was returned on October 18, 1966 naming us and three other persons as defendants. Prior thereto, on September 19, 1966, the same Grand Jury returned indictment 66 Cr. 720, hereinafter referred to as the Continental case, in which we were the only defendants.

b. The Continental case was assigned to Judge Palmieri and was the first to come to trial. It began on September 9, 1967 and lasted for a period of approximately three weeks. We were charged with violations of the Securities Act of 1933 for selling stock in Continental Enterprises without first filing a registration statement with the Securities and Exchange Commission. We were convicted on all counts of the indictment and were thereupon required to post recognizance bonds in the following amounts: affiant Wolfson, Eight Hundred Fifty Thousand Dollars ($850,000) and affiant Gerbert, Five Hundred Thousand Dollars ($500,000), although the government never demonstrated there was any necessity for the posting of bonds in these amounts.

c. Judge Palmieri sentenced us on November 28, 1967. Affiant Wolfson was sentenced to a term of imprisonment for one year, was fined One Hundred Thousand Dollars ($100,000), and was also ordered to pay the costs of prosecution. Affiant Gerbert was sentenced to a term of imprisonment for six months, and was fined Fifty Thousand Dollars ($50,000).

d. The Continental case was appealed and is now pending for decision before the Court of Appeals. The oral argument was held on April 4, 1968.

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e. The Merritt-Chapman & Scott case likewise has been assigned to Judge Palmieri and is scheduled to begin on June 12, 1968. This case also involves, in part, alleged violations of the Securities laws.

f. Initially, the government had moved for the assignment of a Rule 2 judge to preside over all the proceedings in the Merritt-Chapman & Scott case. All the defendants opposed the government's motion and a Rule 2 judge was not assigned. Thereafter the Merritt-Chapman & Scott case was assigned to Judge Palmieri, although not as a Rule 2 judge. When this assignment was challenged by motion in October 1967 and argued before Judge Palmieri in December 1967, our counsel took the position that even if the assignment was procedurally proper, the interests of justice would best be served if another judge presided over the Merritt-Chapman & Scott trial. Judge Palmieri denied this motion principally on the grounds of judicial economy and for other reasons subsequently rejected by the Court of Appeals in Simon.

g. On March 20, Judge Palmieri ruled upon a series of motions, including our motion for a change of venue, which he denied.

h. On April 4, the Continental case was argued in the Court of Appeals.

i. On April 18, one day after the Court of Appeals' decision in Simon, we authorized counsel to file a motion that this case be reassigned to a different judge. The motion was denied by Judge Palmieri on April 24, whereupon we instructed counsel to seek appropriate appellate review. On May 2, the Court of Appeals dismissed our petition for want of jurisdiction, and our counsel advised this Court that we would cure the jurisdictional defect by preparing and filing this affidavit.

At no time since we attempted have this case returned to the Chief Judge for reassignment to another judge has the government interposed any objection to our application.

4. With great regret we are compelled to request that this Court recuse itself from further participation in this case. We submit that all the available facts establish this Court's bias and prejudice in favor of the

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government and against us. In view of the foregoing, we now submit also that this Court's relationship to one of the prosecuting attorneys in this case, Paul Galvani (disclosed to us for the first time on April 24, 1968), established by virtue of Galvani's recent clerkship to the Honorable Edmund L. Palmieri during the years 1964, 1965 and 1966, also requires disqualification quite aside from questions of bias and prejudice, because the prosecutors' conduct has become an important issue in controversy.

5. It is our understanding that bias sufficient to require disqualification exists where the facts establish an "objectionable inclination or disposition of the judge" in favor of one party to the litigation. United States v. Berger, 255 U.S. 22, 35 (1921). The decisions require disqualification in order that there "shall be such an atmosphere about the proceeding that the public will have the 'assurance' of fairness and impartiality." Connelly v United States District Court, 191 F.2d 692, 697 (9th Cir. 1951); Whittaker v. McLean, 118 F.2d 596 (D.C. Cir. 1941); Voltman v. United Fruit Company, 147 F.2d 514, 517 (2d Cir. 1945). We are confident that this Court, upon a review of the facts set forth in this affidavit, will agree that the evidence establishes its "objectionable inclination or disposition" in favor of the government. We are confident also that this Court, upon such a review, will agree that it should recuse itself from further participation in this case so that "the administration of justice [shall] reasonably appear to be disinterested as well as be so in fact." Public Utilities Commission v. Pollack, 343 U.S. 451, 466-67 (1952).

6. The following facts establish that this affidavit is timely:

a. On February 13, 1968 our counsel filed a motion to change the venue of this case from the Southern District of New York to any other judicial district in the country. The principal grounds for this motion were to avoid prejudice which had resulted because of the extensive press coverage of our trial in September, 1967 and our sentencing in late November, 1967. It

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was not until March 20, 1968 that our motion was denied in a written opinion of that date.

b. Between March 20 and April 4, our counsel were dedicating themselves to the preparation of a reply brief in the Continental case and in making preparations for the oral argument of the Continental appeal, which was held in the United States Court of Appeals for the Second Circuit on April 4, 1968.

c. On April 15, our counsel met with us in Jacksonville, Florida and discussed matters pertaining to the irregular assignment of Judge Palmieri to preside at the Merritt-Chapman & Scott trial and matters relating to the filing of an affidavit of bias and prejudice.

d. Two days later, on April 17, the Court of Appeals for the Second Circuit handed down its opinion in Simon, supra. Our counsel interpreted Simon as holding that the preferable procedure was to avoid filing an affidavit of bias and prejudice whenever possible. Accordingly, our counsel filed a motion with Judge Palmieri based on Simon the following day, namely, April 18, 1968. Following Judge Palmieri's denial of this motion on April 24, 1968, a mandamus action was filed in the United States Court of Appeals on April 29, 1968. The Court of Appeals dismissed the mandamus action on May 2 for lack of jurisdiction because no affidavit of bias and prejudice accompanied the application and, on the same day, our counsel advised Judge Palmieri that we had authorized the preparation of an affidavit of bias and prejudice which would be filed as promptly as circumstances would permit.

7. We state in good faith that we sincerely believe that we cannot receive a trial which is fair both in substance and appearance unless the trial is conducted by another of the two dozen judges sitting in this District. We believe that the federal statutes heretofore cited, the rule in the Simon case, and concern for the proper administration of justice require that this Court disqualify itself from further participation in this case.

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EXHIBIT VI(A) P.6

8. Our motion rests upon the following grounds:

a. That the Court's conduct during the trial of the Continental case, and its statements and manner of disposing of issues raised subsequent to the Continental case, indicate that the Court harbors an objectionable inclination or disposition against us and in favor of the government.

b. That in determining to retain the Merritt-Chapman & Scott case for trial, this Court has ignored the long-standing practice in this district and the recent decision of the Court of Appeals in the Simon case.

c. That against the background of this Court's conduct in the Continental case and its subsequent conduct with respect to us, in light of the rule reiterated in Simon, and because the prosecutors' conduct has become an important issue in this case, we are additionally concerned that the pending prosecution against us has been entrusted in part to an Assistant United States Attorney who as recently as September, 1966 served as law clerk to this Court.

9. Our claims:

a. In its conduct subsequent to the return of the verdict in the Continental case, this Court has manifested a bent of mind which we believe will prevent or impede impartiality of judgment. Whatever the source of its attitude toward us and whatever the point in time when this attitude was formed, this Court's prejudicial bent of mind is clear.

(1) Following the guilty verdict in Continental, this Court did impose an extravagantly high recognizance bond pending appeal, $850,000 in the case of affiant Wolfson and $500,000 in the case of affiant Gerbert. Since this was done despite the absence of any showing by the government for the necessity of any such bond, we can't help but conclude that it was done for some reasons personal to himself.

(2) This Court, moreover, took what we regard as the unusual action of imposing terms of imprisonment, not to mention "costs of prosecution," despite the following:

(i) That the applicability of the law to the affiants' conduct was less than clear;

(ii) That no criminal prosecution of anyone in affiants' position (controlling person selling his own stock in unsolicited brokerage transactions) had previously been brought, although the statute has been in effect for 35 years.

(iii) That the evidence as to the affiants' wilfulness was sharply in dispute;

(iv) That there is nothing in the record to indicate that any member of the investing public suffered financial harm because of affiants' conduct; and

(v) That the affiants had never before been prosecuted for any crime and enjoyed a status of distinguished businessmen and respected members of their communities.

(3) On our motion for a judgment of acquittal following the return of the verdict in the Continental case, this Court manifested its hostility and contempt for a chief defense witness, Arvin Rothschild, characterizing him as "that paragon of a corporate executive" and indicating that it thought his testimony was "outrageous." (Tr. 2693)

(4) Moreover, this Court on that same motion expressed its contempt for the defense raised by us, indicating that in its opinion the jury had ample justification for concluding that our key testimony was false. Even if the prejudice displayed by this Court arose solely out of the testimony presented in the Continental case and hence might not standing alone be grounds for overturning that conviction -- a position contrary to that which we believe and have urged on our appeal -- the fact is that at the present time we have

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been given ample reason to believe that prior to the commencement of trial on the pending indictment, Judge Palmieri has become convinced that we are not truthful witnesses*/ and that we wilfully set out to violate the securities laws.

(5) The bent of mind which we believe deprives us of the possibility of a fair and impartial trial was further manifested by the manner in which this Court on April 24th disposed of the motion to have the case returned to the Chief Judge pursuant to Simon. This Court sought to avoid the thrust of Simon, which reiterates the traditional judicial concern that the administration of justice be not only fair but appear to be fair, by assertion of what can only be considered a trivial distinction. This Court said that Simon "spoke only of a retrial, and this is not a retrial." Moreover, this Court sought to justify its retention of this case by resting upon decisions announced in obviously different situations. For example, the Court emphasized the fact that in the Sansone case, (319 F.2d 586) the Court of Appeals had not objected to the fact that this Court had tried a defendant whom it had previously convicted. Our counsel's objections that Sansone not only had failed to seek another trial judge, but had chosen to be tried by this Court without a jury, thus expressing a positive desire to be tried by this Court, were brushed aside as insignificant. Similarly, the other cases relied upon by this Court, for example, United States v. Woodner, 317 F.2d 649, involved no claim before this Court that it should not sit on a retrial. Furthermore, this Court sought to circumvent the Court of Appeals' decision in Simon, rejecting the appellate court's concern that justice appear to be fairly administered, suggesting -- without foundation in light of the omission in Woodner to seek another judge -- that the Simon decision disapproved Woodner "sub silentio," and raising the bogey of "judge shopping."

(6) We are concerned not only by the substance of what this Court has done since the return of the jury verdict in the first case, but also by the manner in which it was done. We note that this Court's opinion rejecting our motion that the case be returned to the Chief Judge for reassignment was

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* The potentially adverse consequences of the Court having such a predisposition are intensified here because both affiants must defend against perjury charges in the Merritt-Chapman & Scott case.

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rendered in a written opinion read to us immediately upon the conclusion of our attorneys' oral argument. The conclusion is inescapable that the opportunity which this Court gave to our attorneys to be heard was nothing more than an empty gesture since the Court had obviously made up its mind right down to the last comma and period prior to hearing argument. Needless to say, we should not be required to go to trial before a trial judge who finds it unnecessary to entertain in good faith the arguments of our attorneys on the many important issues which are sure to arise before, during, and after trial.

(7) The manifest disposition of this Court to reject our positions before they are presented was not an aberration of but a single moment. For on May 2, 1968, when apprised that we, in response to the implicit suggestion of the Court of Appeals, would file an affidavit of bias and prejudice as we are entitled to do under the statute heretofore cited, this Court suggested there was no basis for a claim of bias and prejudice.

(8) This second episode not only reflects this Court's propensity for prejudgment, but also is but another example of this Court's departure from established substantive law in its efforts to retain the Merritt-Chapman & Scott prosecution. It is, of course, well established that it is not the function of a trial judge presented with an affidavit of bias and prejudice to adjudicate the merits of the allegations contained therein. His sole function is to decide the legal sufficiency of the accusations, and if they are legally sufficient to recuse himself.

(9) Moreover, whereas on April 24, 1968, this Court had indicated that we had already filed more than the single affidavit of

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bias and prejudice to which we are entitled,*/ on May 2, 1968 it shifted its ground and suggested that the present affidavit should have been filed earlier. In terms of our fear that we shall not be given a fair trial by this Court, we are troubled by this Court's insinuation, first, that actions not involving any assertion by any defendant that this Court is biased and prejudiced have somehow extinguished our statutory right to file this initial affidavit, and, second, by the suggestion without foundation in the statute that for some reason this affidavit -- which we had desperately hoped to avoid having to file -- should have been filed at some earlier time.**/ We are even more troubled by the manner in which, in the space of one week, this Court shifted from one erroneous attack on our position to another equally erroneous and entirely inconsistent attack.

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*/ Late in 1967 the attorney for another defendant filed his own affidavit urging that this case not go to trial before this Court on February 5, 1968. The affidavit urged that the procedure whereby this case was assigned to this Court for all purposes was irregular and that it was premature to try this matter in February because of the pending appeal in the Continental case and the fact that prejudicial publicity arising out of the first conviction had not yet dissipated. In oral argument our counsel joined that defendant's motion. It was also urged orally that propriety suggested this case be tried by another judge. But it was expressly stated that at that juncture no claim of bias or prejudice was being levied. As for what this Court suggested was the equivalent of a second "affidavit" of bias and prejudice, the motion heard on April 24 in which counsel invoked the Simon decision, no affidavit of bias or prejudice was filed by any party, counsel believing in good faith that the thrust of Simon was that a case like ours should be reassigned without need to consider any affidavit of bias and prejudice. The present motion is the first to be filed within the provisions of Section 144.

**/ Both the parties to this case and counsel have sought to exhaust every alternative remedy before resorting to the filing of such an affidavit. It was not until the decision of the Court of Appeals on May 2, 1968, that we believed no other alternative was available to us. This affidavit has been filed as soon after May 2 as possible. We note that we are filing it more than a month prior to the date on which trial is set. In the Simon case, filing of the motion preceded the proposed trial date by less than two weeks. See generally, paragraph 6 of this Affidavit.

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(10) Finally, in the hearing on April 24, 1968, this Court indicated that it might regard the actual filing of an affidavit of bias and prejudice as a "personal assault" upon this Court. The acrimony between court, parties and their attorneys which inevitably results from the filing of such an affidavit undoubtedly is one of the reasons underlying the Simon decision. When such an affidavit is filed, the waters are poisoned. We have understandably tried to avoid filing such a motion, but now find that we have no alternative in light of the decision of the Court of Appeals on May 2, 1968.

In short, events since return of the verdict in the Continental case have stripped us, the public, and the government, of any assurance that this Court can give us a fair trial.

b. Repeatedly during the Continental trial this Court indicated by its comments, some of which were made in the presence of the jury and some of which were made to counsel in side-bar conferences, that it thought the affiants and key defense witnesses were untruthful, and that we were wilful lawbreakers.

(1) This Court's attitude toward the ultimate issue in the Continental case can be gathered from his comment to counsel in a side-bar conference where it said, indicating a belief in our guilt, "Assuming very charitably that these alleged neophytes blundered into a mistake . . ." (Tr. 1890).

(2) The Court even more explicitly indicated its belief as to our guilt and improper motivations when it stated at the conclusion of the Government's case, "It is clear to me that what they allegedly did and what the proof indicates they did is contrary to the purpose and spirit of the law". (Tr. 1150) It reached this conviction about our guilt even though it recognized that the law "was lacking either in its explicit provisions or lacking in its terms so as to make it readily enforceable." (Tr. 1150).

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(3) During the testimony of Arvin Rothschild, a key witness, this Court repeatedly pressed the witness as to whether his testimony was an "accurate, truthful reply", or an "accurate, forthright reply". (Tr. 1344-1346).

(4) Moreover, in referring to Propel-Pak (to which Continental owned patent rights) this Court observed that "this aerosol product is being injected into the case as the great vehicle which was going to make this company the great company that it didn't become." (Tr. 1363). Furthermore, with respect to whether the facts concerning Propel-Pak were admissible for the purpose of showing what merits might have been disclosed by a registration statement, this Court dismissed the matter with: "What the Government better start doing is prepare a medal with appropriate ribbons to award your client." (Tr. 897).

(5) During affiant Garbert's testimony, this Court repeatedly intervened to summarize the witness' testimony in a disbelieving fashion. After affiant testified how he had begun using additional brokers, the Court observed: "You were just trying to be friendly with everybody and it was a fortuitous situation" which resulted in the change. (Tr. 1832).

(6) Nor did the character witnesses who testified on affiants' behalf escape this Court's censure. In a conference with counsel, this Court disparagingly referred to the character witnesses as "Joe DiMaggio, Sid Luckman and Company". (Tr. 1873). And with respect to one such witness, the Court sought to forestall the effectiveness of the testimony by permitting improper cross-examination and when an objection was made it observed "Here you have a very good looking impressive gentleman, Governor of the whole State of Florida, who testified in a centurion voice, and makes a fantastic impression on the jury. You bring

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in a couple more witnesses like this and the prosecution might as well close up and leave the courthouse." (Tr. 1434).

(7) Affiant Wolfson was repeatedly the victim of the Court's obvious prejudice against him. Believing that it had found an inconsistency in affiant Wolfson's testimony, this Court stubbornly badgered the witness, over and over again, asking whether he was testifying that day in a fashion inconsistent with his prior testimony, repeatedly emphasizing in words "today" and "yesterday". (Tr. 2099-2100). Moreover, this Court announced to counsel that "if the jury were to believe everything that Wolfson says on the stand it would have to infer that he was in an ivory tower some place and other people made the decisions, studied the laws, and he knew nothing about what was going on." (Tr. 2106). This Court repeatedly prejudged what affiant Wolfson was going to say on the stand in response to particular questions. Thus, it told counsel that Wolfson "is probably going to take the tack every time he signed a paper he put a blindfold on." (Tr. 2108). Nor did this Court hide its attitude from the jury. After government counsel had questioned affiant Wolfson with respect to his knowledge of the 1933 Act, the Court intervened with "and I suppose your answer would be the same with respect to the regulations as well." (Tr. 2115). Again, it told counsel "I think on the basis of his prior testimony we all know what the answer is going to be." (Tr. 2119). And further, with respect to affiant Wolfson's testimony on whether he read registration statements which he signed, this Court observed that he "just signed on the dotted line and read parts of it. I guess that is the way to wants to leave it . . . His mind was a total blank on the subject except for a small segment." (Tr. 2130). And again "and I am sure he will say he didn't know any." (Tr. 2131). And the Court speculated, "Suppose I sat at the top of an ivory tower and never touched a phone, never wrote a letter, and never did anything except

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through third parties, and I had 16 runners, all of whom went out, bought and sold stock, which they had no right to either buy or sell, but that it can be shown that they were all acting at my behest, in my behalf, with my encouragement, and so forth." (Tr. 451).

(8) Nor did counsel escape. On one of the rare occasions when an objection raised by defense counsel was sustained, the Court to counsel at the bench remarked, "Very good. I congratulate you." (Tr. 1437).

In sum, this Court made clear both before the jury and out of the jury's presence that he did not regard the affiants either as truthful witnesses or as persons caught in the web of an exceedingly unclear law. Needless to say, cold print fails woefully to capture the tone of Judge Palmieri's voice or his facial expressions while delivering himself of the above-quoted comments.

c. Judge Palmieri's bias against us is also clearly demonstrated by the manner in which he restricted us in presenting our defense in the Continental case.

(1) One of the foremost contentions of the government was that the Continental stock could not have been sold if the public had known that large stockholders were selling. This formed a basis upon which the government argued that there was a motive not to register the stock since registration would have revealed such sales. Our counsel sought to introduce expert testimony that Continental stock could have been sold in a registered underwriting at the same price that it was sold in unsolicited brokerage transactions. Yet, the Court excluded such testimony as "sheer speculation", stating that an expert who so testified would "make an ass of himself". (Tr. 1889). Nevertheless, the Court permitted the government to argue on summation that affiant Wolfson did not cause a registration statement to be filed covering his Continental stock "because in his mind he figured that if he put on the outside of a prospectus that the party offering the

stock includes the sell-out of the controlling people in the company that nobody would buy it or that the price would not be $8 a share but would be somewhat down around nothing." (Tr. 2485).

(2) Affiants' principal defense was that if Section 5 of the 1933 Act had been violated, such violations were not wilfull, since affiants believed registration was not required where an individual desired to sell his stock in an unlisted company. Continental was concededly an unlisted company. Affiants, as well as a government witness, testified concerning affiants' confusion as to the requirements applicable to listed and unlisted securities. Judge Palmieri, however, took this critical issue from the jury despite Requests Nos. 27 and 32 filed by our counsel. He instructed the jury both in his original charge and in response to a question during deliberations, that "there is no difference between a listed or unlisted company as far as this case is concerned." (Tr. 2653). Taking from the jury, as the Court did, the substantial defense -- indeed, our principal defense -- of honest mistake as to the law indicated a bias by the Judge against us and a desire that we be convicted.

(3) Judge Palmieri indicated a bias and prejudice against us and his indifference to our being subjected to a wrongful conviction when he spontaneously, if inadvertently, revealed that he considered his own luncheon schedule more important than assuring us a fair trial and a fair jury verdict. On the last day of the trial, our counsel presented supplementary instructions in an attempt to correct some of the severe prejudice created by the prosecutor's summation. Our counsel had worked diligently all night to present these most important papers. Judge Palmieri stated he did not wish to be subjected to the inconvenience of studying further requests to charge "during his lunch hour". (Tr. 2614). After lunch the Court said it had taken time "to look over" our supplemental requests but refused "to supplement my charge to include any of these". (Tr. 2628). Whether or not Judge Palmieri fairly considered these requests we are not in a position to say but, by virtue of the above, we are personally convinced he did not.

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(4) Judge Palmieri's bias against us is further reflected in the contrasting consideration he gave to a government witness and to our character witnesses. The government called one Rittmaster as a witness and the Court precluded our counsel from examining him concerning his indictment in the Merritt-Chapman case. The Judge excluded such testimony on the ground that it would be contrary to the presumption of innocence. Yet, when he called character witnesses in our behalf, Judge Palmieri permitted the government to ask them whether they knew that we had been indicted for fraud in the Merritt-Chapman case. Needless to say, this was less than even-handed justice.

d. In contrast, the government was permitted by the Trial Judge to proceed in a manner which was unorthodox and legally unjustified. The Court refused to interfere with the government's presentation of its case even though the government chose to proceed in a manner which was contrary to the well-established rules of law and evidence. Its failure to act time and again demonstrated lack of concern for the protection of our rights and substantially prejudiced us.

(1) The proceedings which occurred at the opening of trial, before any testimony had been given, reflect the wholesale introduction by the government of documentary evidence without any showing that it related to the issues in the case. Surprisingly enough, some of this documentary evidence did not even relate to the defendants on trial. Although the Court recognized that the procedure employed by the government prosecutor was a rather unusual one, he indicated his reluctance "to tell him how to run it" (Tr. 179) and admitted the proffered documents upon the unsupported assertions by the prosecutor that they were relevant and would be connected up during the trial.

(2) For example, government counsel offered at the outset the annual reports of Continental Enterprises, Inc. for the period 1955 through 1962. Since the conspiracy was not alleged to have begun until 1959, the reports for the years 1955 through 1958 were objected to by our counsel as immaterial and irrelevant. Materiality, however, was represented by the prosecutor to lie in the fact that they reflected ". . . the continuing financial deficit" of the corporation (Tr. 192) and although such fact had no real bearing on the issues in this case, they were admitted by the Court. Although

recognizing the difficulty of having to rule "without having heard the evidence" (Tr. 193) the Court justified their admissibility on the grounds that since they referred to Continental Enterprises, Inc. "it may be helpful to the jury to know something about the business background and development of this enterprise" (Tr. 192).

(3) Also, several documents were offered prior to the taking of any testimony for the purpose of showing "an awareness on the part of the defendants of the provisions and exemptions to the Securities Act of 1933." (Tr. 197). These were SEC forms one of which had been filed by affiant Wolfson and the other two by members of his family (alleged co-conspirators) in connection with their sales of certain listed securities. All three of the documents predated the inception of the conspiracy as charged by the indictment. None of them had anything whatever to do with affiant Gerbert. They were registration forms different in kind from that which the government contended was required of the defendants in the Continental case. Nevertheless, all the documents were admitted against affiant Gerbert.

(4) The Court's erroneous and prejudicial rulings on the admission of documents continued throughout the government's case. To illustrate, certain documents were admitted through John Morley, a Jacksonville stockbroker with A. M. Kidder, who stated that the documents had been prepared by persons who worked in the New York office of A. M. Kidder. They reflected the opinions and conclusions of such employees relating to affiant Wolfson's securities transactions. (Government's Exhibits 4-K-1, 4-P, 4-Q and 4-R). The Court permitted their introduction through Morley on the theory that they were "business records" of A. M. Kidder, despite Morley's testimony that he had not prepared them and saw them for the first time immediately prior to trial in the office of the United States Attorney. These were documents which the Government used to corroborate Morley, their key witness, who had testified that as a matter of practice he would have cautioned affiant Wolfson about the regulations governing the sale of his stock.

(5) Still other instances exist where the Court refused to restrict the government within legitimate bounds and failed to exercise sound judicial discretion.

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(a) Government counsel was permitted by the Court to ask affiant Wolfson this question during his cross-examination: "Isn't it a fact that on August 1, 1958 you consented to a permanent injunction filed in this court with respect to your further fraudulent activities in connection with the sale of American Motors stock?" Actually, there is no reference anywhere in the injunction to "further fraudulent activities." Moreover, the prosecutor was permitted to offer in evidence a copy of the consent decree itself, with an admonition by the Court to the jury that its sole purpose would be "to indicate, if you believe it indicates, the knowledge of the defendant with respect to the SEC laws and regulations" (Tr. 2111). This evidence was extremely prejudicial, especially in light of the use which was made of it by the prosecutor. In his summation he argued not that it tended to show knowledge by affiant Wolfson of the SEC laws and regulations, but rather as proof of the actual commission of fraud in American Motors stock transactions in 1958.

(b) During rebuttal the government offered in evidence, over objection, a 1950 memorandum based solely on the representation that it would show affiant Wolfson's knowledge of the terms of Section 5 applicable to a control group situation regarding Capital Transit. However, the government was permitted by the trial judge to depart from its proffer and elicit testimony that the Securities and Exchange Commission was in fact investigating Capital Transit, that the stock was being manipulated, and that in the opinion of the Securities and Exchange Commission affiant Wolfson had violated Section 5.

e. This Court's bias and prejudice against us and his favorable disposition toward the government are dramatically evidenced by the nature of the searching interrogations which he conducted of us and certain of our witnesses during trial. The nature of such interrogations and the manner in which they were pursued conveyed to the jury the unmistakable impression that

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the Court gave little, if any, credence to our case, that it favored the prosecution, and that it desired a verdict of guilty.

(1) The interrogations hereinafter set forth -- of our witness Arvin Rothschild and of us -- must be viewed and considered in the context of a trial in which the Court conducted virtually no examination of the government witnesses. Those few isolated instances in which the Court did examine certain government witnesses (see e.g. 388-89, 399-401, 414, 417-18 and 929-931) reflect questions which tended to clarify or further develop a matter and were quite different in length and in substance from those with which we were confronted. In our case, the Court crystalized the conflicts between our testimony and that of government witnesses, suggested the implausibility of our testimony and, in the case of affiant Wolfson, stressed the fact that his testimony had been changed from one day to another. We set forth here at some length the specific interrogations of which we complain because only by doing so can their prejudicial effect be fully appreciated.

(a) Arvin Rothschild

During cross-examination, he was being questioned by the prosecutor about a letter which he had sent to a Continental stockholder who had inquired about rumors that affiant Wolfson was selling his Continental stock. The Judge interrupted the examination and proceeded to question Mr. Rothschild as follows:

> Q That was an accurate, forthright reply?
>
> A No, your Honor. I think the reason I wrote that was because I thought he was talking about current rumors.
>
> Q But if he had said had they been selling you would have answered him differently?
>
> A I would probably have found out from counsel if a president of a corporation was required to divulge this information, sir.
>
> Q But there was foundation there for that inquiry, was there not?
>
> A The rumors at that time.

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Q And you had a foundation for a different reply, did you not?

A Yes, sir.

Q You kept yourself currently advised as to those transfer sheets, didn't you, regardless of what the transfer sheets reflected, and the transactions were one, two or three months old, and you kept looking at them?

A Yes, sir.

Q But on the basis of your knowledge from these sheets, there was ground for a different reply, wasn't there?

A Possibly but it depends on the time, sir.

Q Possibly but it depends on the time?

A Right.

Q Did you tell this to the stockholder depending on the time you are inquiring about I can give you an accurate answer?

A No. My date of March, 1961, I wrote back that as of that date -- I didn't say as of that date; perhaps I should. Is it a question of semantics.

Q It is not a question of semantics, whether Mr. Rothschild. It is a question of whether it is accurate or inaccurate. That is what Mr. Armstrong is trying to ask you about. That is what I am trying to ask you about.

You told this inquiring stockholder that was purely a matter of rumor and without foundation. Is that what you said?

A Yes

Q That was an accurate, truthful reply?

A To my way of thinking it would be because I didn't know of any sales that were going on at that time in March.

Q At that time you didn't know of any sales?

A Yes, sir.

Q Because your transfer sheets were about two months old, is that right?

A My best guess and estimate. I don't really know.

THE COURT: All right. I have no further questions.

(Tr. 1344-1347

* * *

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Q As of the time you wrote the letter, as far as you knew, the sales that had taken place in the past about which you already knew could very well be continuing right up through the date of the letter?

A Could have been. I didn't feel that was my business, though.

THE COURT: But you didn't tell that to the stockholder, did you?

THE WITNESS: No, sir, I didn't.

THE COURT: You could have told him it is 'not my business to tell you,' but you didn't tell him that?

THE WITNESS: I shouldn't think it was.

THE COURT: What you told there was not the truth, and there was no foundation; is that you way of disposing of it?

THE WITNESS: Yes, sir.

(Tr. 1248)

If there be any doubt from the nature of this interrogation that the Judge disbelieved the testimony, that was made quite clear by him during the oral argument of the motion for judgment of acquittal when he referred to him as that "paragon of a corporate executive" and stated that "it was one of the most outrageous bits of testimony in the case and I had to exercise a considerable amount of self-restraint to keep from commenting on it in my charge." (Tr. 2693)

Even though the Judge chose not to comment upon Rothschild's testimony, he effectively denied us the benefit of it. Not only was Rothschild a most important witness on behalf of the defense but, more importantly, he was a named co-conspirator in the indictment and discrediting his testimony seriously prejudiced our defense.

(2) There is no dispute that the government's most important witness was John Morley. Morley testified that he told affiant Wolfson on January 6, 1958 that because he had named two persons to the board of directors of American Motors he had been instructed not to sell any more of his American Motors stock. Morley stated that the 400,000 shares of American Motors stock which affiant Wolfson then had at A. M. Kidder were then "paid for" and "taken out." (Tr.

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2886). The impact of this testimony by Morley is obvious; that is, once Morley called to affiant Wolfson's attention the fact that he would restrict his sales in American Motors stock because of certain securities regulations, affiant Wolfson reacted by withdrawing over four million dollars of business from his firm.

The subject was not again referred to until some two weeks later when affiant Wolfson himself was on the witness stand. It came after the prosecutor had conducted lengthy cross-examination of affiant Wolfson and after he had asked the last question for the day. (Tr. 2088) At that time, the Court stated it desired to ask certain questions, and injected itself into this entirely new area.

BY THE COURT:

Q Mr. Wolfson, you have for many years had a very satisfactory relationship with A. M. Kidder Company, did you not?

A Yes, sir.

Q With Mr. Morley in particular?

A Yes, sir.

Q Did a time come when you had a falling out with Mr. Morley?

A No, sir, never have.

Q Was there some unpleasantness with him in 1958?

A No.

Q Any indication why you pulled out of his office 400,000 shares of American Motors stock?

A I think that was at the request of his New York office; they didn't want to carry it.

Q You do remember that 400,000 shares of American Motors stock having a value of several million dollars were removed from his office?

A Yes, sir

Q In 1958?

A Yes, sir.

Q What were the circumstances which precipitated that action?

A I wouldn't know, your Honor, except that Mr. Gerhart or Mr. Mullaney told me they could have a request from A. M. Kidder, Mr. Morley, to move this stock out.

Q You recall Mr. Morley's testimony to the effect that he spoke directly to you about the impediments which existed by law and of which he was advised by his New York office concerning your trading in that stock? He testified to that at this trial.

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'Do you recall saying anything to Wolfson as to why his or his representatives being on the board made it necessary for you to refuse to handle the orders in the account?

'A Because when they went on the board and our firm viewed it as though Wolfson was on the board, since they were his representatives, he would then become a restricted person as far as sales. I could accept no further sales in American Motors from Mr. Wolfson, his family or his associates.'

Do you remember that testimony?

A Yes, sir.

Q That does refresh your recollection?

A Yes, sir, but when Mr. Morley said Wolfson, he could talk to me, Mr. Mullaney or Mr. Gerbert, or anyone else, and think he is talking to me because I don't remember Mr. Morley talking to me.

Q His testimony was that he talked to you. Is it your testimony that he did not talk to you?

A I don't remember any conversation directly with Mr. Morley on that subject.

Q I won't read all of this testimony but Mr. Morley stated in effect that he had this telephone conversation with you and that you then said in substance to him did he think his lawyers were better than your lawyers and he said he did not but that he was running a regulated business, or words to that effect, and right after that, this large amount of American Motors stock was taken out of the office.

Do you deny ever having had that conversation with Mr. Morley?

A I don't remember any conversation with Mr. Morley on that.

Q You do remember the removal of the shares from the office?

A Yes, but my office advised me it had to be moved and we made our arrangements.

Q That is the only reason you can recall for that action, the fact that your office advised you that you had to make other arrangements?

A Well, we had to move the stock, yes, sir.

THE COURT: We will stand adjourned, ladies and gentlemen, until 10:15 tomorrow morning.

In effect, the trial judge accomplished the following as a result of this interrogation:

(a) He re-read to the jury the testimony of Morley relating to a critical issue in the case.

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(b) He obtained from Wolfson a denial that the conversation even occurred.

(c) He elicited testimony from Wolfson that his American Motors stock had been withdrawn from A. M. Kidder at about this time.

That evening affiant Wolfson obtained information from records which were in his office in Jacksonville that Morley's testimony was untrue; that Wolfson had never withdrawn his American Motors stock from A. M. Kidder. In fact, during the months of January, February and March, 1958, he had continued to sell substantial amounts of his American Motors stock through A. M. Kidder. */ When the prosecutor began to question affiant Wolfson further about this subject the next day, Wolfson attempted to correct his testimony. The judge quickly interrupted the prosecutor's questioning, emphasized to the jury that affiant Wolfson had testified differently the day before, and made these statements:

"Are you testifying to something else now? . . ."

"That is not what you said yesterday . . ."

"In what respect does your testimony today differ from what you testified yesterday? . . ."

"And you find now that your recollection was in error . . .?"

Not only did the judge thereby effectively discredit Wolfson's testimony and indicate his disbelief in it, it was all the more prejudicial because he later told the jury that once they resolved this conflict between Morley and Wolfson it would "take you a considerable way on the road to deciding the controverted issues in this case." (Tr. 2556).

(3) As was the case with Rothschild and affiant Wolfson, the Court's interrogation of affiant Gerbert concentrated on a most important issue in the case. The questions themselves best illustrate the point:

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*/ Apparently, in the Government's possession all the time was a document which reflected sales by affiant Wolfson of his stock in American Motors through A. M. Kidder during January, February and March (See reply brief in Continental, point II C).

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"May I interrupt to ask one or two questions which occur to me at this time?

"When you placed these sell orders, I take it in each instance you acted on the instructions of Mr. Louis Wolfson both as to the amount of shares and the price at which you were to sell?

"THE WITNESS: Yes, sir.

"THE COURT: That is your testimony?

"THE WITNESS: Yes, sir.

"THE COURT: But you are unable to recall the amounts of the shares in a great many instances, is that correct?

"THE WITNESS: That's right, yes, sir." (Tr. 1817-1818)

The Court's examination of affiant Gerbert covered the circumstances surrounding the confirmations of sales, his practice in reporting the sales which he made to affiant Wolfson (Tr. 1818 - 1819), and the circumstances of his signing Government Exhibit 4-N. This was a letter bearing Gerbert's signature containing a representation that he had not sold, and did not intend to sell, any of his own Continental stock in addition to that covered in the letter. The Court's questions directed at the letter were these:

"Did you sign that, Mr. Gerbert?

"THE WITNESS: Yes, sir.

"THE COURT: Would you be good enough to tell us the circumstances under which you signed that?

"THE WITNESS: Your Honor, I have searched my mind ever since this was brought up and I can't recall even signing this piece of paper.

"THE COURT: Does it ring any bell now?

"THE WITNESS: No sir, it does not.

"THE COURT: The words of this paper mean nothing to you?

"THE WITNESS: Nothing to me, no sir.

"THE COURT: You were never aware of the fact that selling no stock in the last year, or anywhere else, had any significance so far as the sales orders were concerned?

"THE WITNESS: No, sir. No, sir.

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"THE COURT: I have just shown you Government's Exhibit 4-N. Thank you. Those are all the questions I wanted to ask Mr. Gerbert." (Tr. 1820)

The importance of Government's Exhibit 4-N is best illustrated by the statement which the prosecutor made during summation that it alone was sufficient to warrant affiant Gerbert's conviction. (Tr. 2471, 2493).

10. Pursuant to Section 455 of Title 28, United States Code, we believe that in the interest of justice this Court should recuse itself by reason of its relationship with Paul Galvani, one of the two prosecutors assigned to this case. Until September 16, 1966, three days before the return of the Continental indictment and barely one month prior to the return of the present indictment, Mr. Galvani was law secretary to the Honorable Edmund L. Palmieri, and had served in that capacity for two years. Although in the ordinary situation there is no prohibition against a former law clerk's practicing before "his" judge, the present case is far from an ordinary one. Our counsel, on their own, recently learned that the government was engaged in a widespread effort to subpoena both individuals and documents long prior to trial, without making any effort to comply with the clear provisions of Rule 17(c). Once having learned of this fact, they immediately moved to quash these subpoenas and to have the Court suppress the fruits of the government's illegality. On April 23, this Court conceded that the prosecutors were in violation of the letter and spirit of Rule 17(c), and instructed them, thereafter, to proceed on notice to all parties. Nevertheless, he failed to quash the subpoenas or suppress the fruits. Instead, he gently admonished them and ruled that the affiants must trust the prosecutors to preserve affiants' rights regarding the illegal material already obtained (Transcript of argument on April 23, 1968, pp. 46-48).

These acts of prosecutorial overzealousness and misconduct in this case do not stand alone. Perhaps, if they did, we would not be as concerned as we presently are. But, we find that it first happened when this matter was being investigated by the grand jury (see reply brief in Continental, point 4, p. 35) and it has now happened again with the issuance of some 30 illegal subpoenas. Our counsel have also been informed just recently of still other tactics to which the prosecutors have resorted and which we believe are as

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equally reprehensible. It is not unlikely, given all these circumstances, that this is an issue which shall remain prevalent in this law suit and, therefore, given the relationship between the Court and Mr. Galvani affiants ought not to be required to have Mr. Galvani's mentor pass upon these issues of prosecutorial misconduct.

11. In conclusion, we respectfully believe that we have a right to go to trial on the present indictment, as to which the presumption of innocence applies, before a judge who has not previously formulated a belief as to our credibility as witnesses and as to our law-abiding character. It is unthinkable that we should be put to defend our liberty and our reputations before the one judge in twenty-four who -- before a single word of testimony has been taken -- harbors a bias and prejudice with respect to our truthfulness and integrity. The Court of Appeals in Simon pointed the way to avoidance of this kind of intolerable anomaly. Surely our right to a fair and impartial trial is every bit as great as the right asserted by the government in Simon. We belie e that our claim of bias and prejudice is substantially more compelling than was the government's there. Indeed, at stake for us is our freedom and reputations. Consequently, we ask for the very same relief which the government recently obtained in Simon.

We file this affidavit reluctantly but with an honest and abiding conviction that we shall be denied a fair and impartial trial unless we are given the relief requested herein.

_____
Louis E. Wolfson

Subscribed and sworn to before me this ____ day of May, 1968

_____
Notary Public

_____
Elkin B. Gerbert

Subscribed and sworn to before me this ___ day of May, 1968.

_____
Notary Public

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815 CONNECTICUT AVENUE
WASHINGTON, D. C. 20006

File Copy

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	66 CR. 720
	)	
	)	
LOUIS E. WOLFSON	)	

MOTIONS FOR DISCOVERY

In conjunction with the Petition for Writ of Error Coram Nobis filed herewith, petitioner Wolfson asks the Court for an Order granting the following limited discovery:

a) The grand jury minutes re the Continental indictment;

b) A list of the names, addresses, and professions of all members of the Continental grand jury;

c) Permission to address certain interrogatories to William McRitchie, the foreman of the grand jury in the Continental case;

d) Any Government records (including grand jury minutes) relating to testimony of petitioner Wolfson's attorney, Joseph Glickstein, Sr., before the Continental grand jury;

e) Production by the Government (for in camera inspection) of any Criminal Reference Report relating to petitioner's other attorney, Milton Gould, which is in any way related to the Canadian Javelin case.

f) Permission to address certain interrogatories to the New York brokerage firm of Weis, Voisin and Cannon, Inc., or its successors;

g) Permission to address certain interrogatories to Judge Palmieri re the Continental grand jury, foreman McRitchie, etc.

As is explained in Part III of the basic Petition (at pp. 15-16), a petition for a writ of error coram nobis does not fit neatly into either the criminal or civil category; and neither the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure are applicable to it en toto. It is petitioner's contention that the procedures in a coram nobis proceeding, as in a habeas corpus proceeding, should be fashioned to fit the necessities of each particular case, and, further, that it is within the Court's discretion to grant discovery where the ends of justice so indicate.

The explanation for the need for discovery to items a), b) and c) above are found at pp. 26-27 of the main Petition; as to item d), please see p. 45 of the main Petition; as to item e), please see p. 46 of the main Petition; as to item f), please see p. 51 of the main Petition; as to item g., please see p. 80 of the main Petition.

RESPECTFULLY SUBMITTED:

FENSTERWALD & OHLHAUSEN
910 16th St., N.W.
Washington, D.C. 20006
Tel: (202) 223-1667

BY: _____
BERNARD FENSTERWALD, JR.

BASS & ULLMAN
747 Third Avenue
New York, New York 10017
Tel: (212) 751-9494

BY: _____

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	66 CR. 720
	)	
	)	
LOUIS E. WOLFSON	)	

MOTION FOR RECUSAL OF JUDGE PALMIERI

Comes now Petitioner who hereby respectfully moves that Judge Palmieri, to whom his Petition for a Writ of Error Coram Nobis has been assigned, recuse himself from further participation in this matter, and that he requeststhat the Petition be assigned to another judge. The grounds for this motion are (1) that the Petition recites inter alia a number of acts by Judge Palmieri which, in Petitioner's view, contributed to his failure to receive a fair trial; and consequently, to a denial of his constitutional rights; (2) that he is entitled to an evidentiary hearing on his Petition; (3) at such evidentiary hearing, he thoroughly intends to call Judge Palmieri as a witness; and (4) there is no way in which Judge Palmieri can act as trier and witness simultaneously.

A supporting Memorandum of Fact and Law is attached hereto.

Respectfully submitted:

FENSTERWALD & OHLHAUSEN
910 Sixteenth Street, N.W.
Washington, D.C. 20006
Tel: (202) 223-1667

BY: (Sod)
BERNARD FENSTERWALD, JR.

BASS & ULLMAN
747 Third Avenue
New York, New York 10017
Tel: (212) 751-9494

BY: _____

Dated: June 18, 1975

RECEIVED
JUL 30 1975
FENSTERWALD AND OHLHAUSEN

CR 169 CPIN 554

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U.S. DISTRICT COURT
FILED
JUL 23 1975
S. D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

LOUIS E. WOLFSON

---

56 Cr. 720

42837

A P P E A R A N C E S

FENSTERWALD & OHLHAUSEN, ESQS.
910 15th St., N.W.
Washington, D. C. 20005

BASS & ULLMAN, ESQS.
747 Third Avenue
New York, N. Y. 10017

Attorneys for Petitioner Louis E. Wolfson

BERNARD FENSTERWALD, JR., ESQ.
ROBERT ULLMAN, ESQ.
Of Counsel

PAUL J. CURRAN, ESQ.
United States Attorney for the Southern
District of New York
United States Courthouse
New York, N. Y. 10007

ANGUS MacBETH, ESQ.
Assistant United States Attorney
Of Counsel

BEST COPY AVAILABLE

PALMIERI, J.

On May 15, 1975, petitioner Louis E. Wolfson filed a voluminous petition for a writ of error coram nobis relating to his conviction in 1968, after a jury trial, for violating and conspiring to violate the federal securities laws (Section 5 of the Securities Act of 1933, 15 U.S.C. § 77(e) and 18 U.S.C. § 371). United States v. Wolfson, 63 Cr. 720 (the Continental Enterprises case). Petitioner was sentenced to one year in prison and fined $100,000. The conviction was affirmed, United States v. Wolfson, 405 F.2d 779 (1968) and certiorari denied, United States v. Wolfson, 394 U.S. 948 (1969).

In contravention of the Individual Assignment and Calendar Rules for the Southern District of New York which provide that once assigned a criminal action remains with the assigned judge for all further proceedings,[1] the petition was addressed to the Chief Judge of this District with the request that it "be assigned to a judge other than the trial judge." Petitioner also sought to have it placed on the Part I calendar, again in contravention of the local rules.[2] The petition having been referred to me in due course, petitioner now moves that I recuse myself. He submits no affidavit of bias or prejudice, nor has counsel of record[3] filed a certificate stating that such affidavit

was made in good faith, as required by 28 U.S.C. § 144.[4] The complete absence of any compliance with the statute is a jurisdictional defect which itself warrants the denial of the motion. Gallela v. Onassis, 487 F.2d 986, 997 (2d Cir. 1973); Polfon v. Palmieri, 324 F.2d 7 (2d Cir. 1963). However, something more must be said.

The ground on which petitioner moves for recusal is that he intends to call the trial judge as a witness if his motion for an evidentiary hearing is granted, and that, consequently, this Court, having conducted the trial, may not act as trier and witness simultaneously. It is clear under 28 U.S.C. § 455 that a judge who is a material witness should not preside at a factual hearing in the case. It is equally clear from the coram nobis petition, in which petitioner recites the matters about which he wishes to question me, that there is no basis for my being called as a witness in this proceeding.

Petitioner would allegedly question this Court about its supposed empanelling of the grand jury which indicted him in the Continental Enterprises and Merritt-Chapman cases[6] and its selecting as its foreman a man whom he claims has admitted to knowing me "slightly." This Court is unable to recall any contact with this grand juror, or find any evidence of it. But assuming the accuracy of his alleged statement, it would not justify this Court's

being called as a witness. This court did not impanel the grand jury or select its foreman.[7] Petitioner is charged with knowledge of these facts. By motion papers dated April 7, 1967, Milton S. Gould, Esq., petitioner's former counsel, moved for dismissal of the indictment in this case claiming that the grand jury selection was in violation of the statutes and Constitution of the United States. Attached as exhibits were a copy of the grand jury venire from which was selected the grand jury in this case, and a copy of the list of the grand jurors who handed up this indictment. It is clearly indicated that another judge of this court presided at the empanelling of these grand jurors on August 9, 1966. A copy of Mr. Gould's motion papers is attached as Appendix A.*

Petitioner also seeks to question this Court on its assignment as trial judge in both the Continental Enterprises and Merritt-Chapman cases. This matter was fully litigated in petitioner's motion to recuse me in the Merritt-Chapman case, opinion filed May 15, 1968, and his petition for a writ of mandamus, Wolfson v. Palmieri, 396 F.2d 121 (1968), both of which were denied. It cannot be pursued in a post-conviction collateral attack. See p. 9 infra.

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* These motion papers include a list of the names, addresses and professions of all members of the grand jury and thus satisfy petitioner's request (b) in his Motion for Discovery filed May 15, 1975.

In sum, this Court cannot discern any issues which are appropriately before it in the coram nobis petition, and which would necessitate calling the trial judge as a witness. Since petitioner's discussion of "the question of the appearance of detached impartiality" is predicated upon a need for the trial judge's testimony, it requires no comment. Although the recusal motion itself makes no mention of them, the coram nobis petition includes numerous allegations of "judicial bias and prejudice," presented as evidence of the unfairness of petitioner's trial rather than points on which he would call this Court as a witness. Despite petitioner's failure to make the requisite affidavit of bias and prejudice, a brief comment on these charges is added in the interest of expediency.

Petitioner urges that the bias and prejudice against him are evidenced by statements at trial, the sentence imposed, the bail set, and this Court's refusal to recuse itself in the Merritt-Chapman case. He also cites as a "conflict of interest" the fact that in that case a former law clerk served as an assistant prosecutor. As petitioner himself admits, each of these points has already been before the Court.

> "In an attempt to have Judge Palmieri to [sic] recuse himself from sitting in the Merritt case, petitioner filed a lengthy affidavit of bias and prejudice, dated May 8, 1968. This affidavit covers in detail the points to be covered in the section." Coram Nobis Petition at 78.

That affidavit was considered and rejected both by this Court (opinion of May 15, 1968) and the Court of Appeals, Wolfson v. Palmieri, 396 F.2d 121 (2nd Cir. 1968).

Nonetheless, petitioner now seeks to reiterate these same charges with respect to the Continental Enterprises case. The issue, however, is precisely the same: whether or not this Court is biased and prejudiced against petitioner within the purview of the recusal principles. This issue was fully considered by the District Court and the Court of Appeals and it cannot be relitigated in a collateral attack. The Second Circuit has pointed out that a motion under 28 U.S.C. § 2255 is the modern equivalent of a coram nobis petition. United States v. Thompson, 261 F.2d 809 (2nd Cir. 1958). A motion under section 2255 or a petition for a writ of error coram nobis may not be used to relitigate matters already decided. Williams v. United States, 334 F. Supp. 889 (S.D.N.Y. 1971), aff'd 463 F.2d 1183 (2d Cir.), cert. denied, 409 U.S. 967 (1972); Meyers v. United States, 446 F.2d 37 (2d Cir. 1971); Kurgia v. United States, 448 F.2d 1275 (9th Cir. 1971); Jackson v. United States, 394 F.2d 114 (5th Cir. 1968). None of these charges made by petitioner may now be reconsidered as a de novo basis for recusal. Moreover, as to the alleged "conflict of interest," the former law clerk did

not participate in the Continental Enterprises case, and thus that claim is not relevant to the coram nobis petition. The only allegations of bias and prejudice not dealt with by the Second Circuit in Wolfson v. Palmieri, supra, are those relating to the health of petitioner and his wife.[6] Those relate to various procedural decisions made before and after trial in the Merritt-Chapman case. It would be sufficient to state that the petition before this Court is based on the proceedings in the Continental Enterprises case, which terminated about a year before, and that subsequent events can have no relevancy to it. Totally apart from this however, it is important to stress that the discharge of a court's function in deciding controverted issues cannot be the basis for "bias." This must be of "extra judicial origin, derived non coram judice." Craven v. United States, 22 F.2d 605, 607 (1st Cir. 1927), cert. denied, 276 U.S. 627 (1927). Accord, Mirra v. United States, 379 F.2d 782 (2d Cir.), cert. denied, 389 U.S. 1022 (1967); Tynan v. United States, 376 F.2d 761, 765 (D.C. Cir.), cert. denied, 389 U.S. 845 (1967).

CONCLUSION

Petitioner has failed to set forth any ground on which this Court should disqualify itself from hearing his coram nobis petition. His charges with respect to the

Court's relationship to the grand jury which indicted him are completely erroneous and manifest a failure to study the court papers upon which his petition is allegedly based. All but two of petitioner's charges of bias and prejudice have already been adjudicated by this Court and the Court of Appeals, and serve no purpose except to fill out the voluminous bulk of his petition. The charges not previously litigated are irrelevant and legally insufficient. Petitioner is clearly chargeable with notice of all the prior proceedings in his cases, but has chosen to proceed as if they had not taken place. The jurisdictional deficiencies of this recusal motion, the scattershot nature of the coram nobis petition on which it rests, and the manner in which petitioner sought to place his petition before any judge other than myself constrain me to reiterate what was stated in the conclusion of this Court's opinion dated May 15, 1968, in which petitioner's third motion to recuse me in the Merritt-Chapman case was denied:

> "I repeat what I have had occasion to say in my opinion of April 24, 1968, that judge-shopping is an intolerable evil. I consider it one which no court can condone without a sacrifice of its integrity ... [it is] my profound conviction that it is just as important for a judge to resist in an appropriate case any assault upon his retention of his responsibilities as it is for him

to recuse himself in the appropriate case. (See opinion of April 24, 1968, pages 6-7, and cases there cited.)."

Motion denied. It is so ordered.

EDMUND L. PALMIERI
U. S. D. J.

Dated: New York, N. Y.
July 23, 1975

FOOTNOTES

1. Rule 4(a):

"All criminal actions and proceedings, except those referrable to a magistrate, shall be assigned in the first instance to the judge presiding in Part I for preliminary proceeding through the pleading stage, after which the case shall be assigned by lot to one judge for all further proceedings."

2. Rule 8(b)(3):

"The judge presiding in Part I shall:

. . .

(3) hear and determine all emergency matters in criminal cases which have been assigned to a judge when the assigned judge is absent or has expressly referred the matter to Part I because he is unavailable due to extraordinary circumstances."

Judge Gagliardi was presiding in Part I at the time petitioner filed his petition. Petitioner's statement that "For a short while, Judge Gagliardi appeared to have jurisdiction over the matter," is, however, incorrect, since this was not an emergency matter, I was not absent, nor had I referred the matter to Part I. Judge Gagliardi has at no time asserted any jurisdiction in the matter.

3. Present counsel consist of a New York firm, Kaye & Ullman, the counsel of record, and a Washington firm. Neither has ever appeared for petitioner in any previous proceedings before this Court and the papers they have submitted demonstrate an unfortunate lack of familiarity with the proceedings upon which the petition is based.

4. 28 U.S.C. § 144. Bias or prejudice of a judge

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed

- 1 -

no further therein, but another judge shall be assigned to hear such proceeding.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

5. 28 U.S.C. § 455. Interest of justice or judge

"Any justice or judge of the United States shall disqualify himself in any case in which he ... is or has been a material witness ..."

6. The Merritt-Chapman trial was an entirely separate proceeding from the Continental Enterprises case and involved different charges. In the Merritt-Chapman case petitioner was charged with fraud in the purchase of stock and committing perjury in filing false reports with the Securities and Exchange Commission. Nor were the defendants identical. Wolfson and Gerbert were the only defendants in the Continental Enterprises case. They were two of the five defendants in the Merritt-Chapman case. United States v. Wolfson, Opinion filed May 15, 1968; Wolfson v. Palmieri, 396 F.2d 121 (2d Cir. 1968). The trial of the Continental Enterprises case took place from September 6, 1967 to September 29, 1967; the trial of the Merritt-Chapman case took place from June 17, 1968 to August 8, 1968. While petitioner was found guilty by a jury in both cases, his conviction was reversed by a divided court in the Merritt-Chapman case. United States v. Wolfson, et al., 437 F.2d 862 (2d Cir. 1970).

7. It should be noted in any event that petitioner's intimation that in a multi-judge District it is improper for a judge to preside at the trial of an indictment handed up by a grand jury which he has empanelled is not supported by any authority.

8. Some time before December, 1968, the Court was made aware that Mrs. Wolfson was suffering from terminal cancer. The fixing of the date of sentence of petitioner in the Merritt-Chapman case, far from being made in "wanton disregard" of Mrs. Wolfson's health, was made only after the Court, with consent of all counsel, was in direct contact on several occasions with Dr. Rand of Miami, the treating physician, with a view to fixing a date for sentence during a period when Mrs. Wolfson might be in a period of remission. The problem was further complicated by the fact that petitioner declined to travel by airplane thereby greatly extending the time of any absence from Florida. The sentence was set down for a late morning hour so as to permit petitioner to attend at court between his train arrival and departure at Pennsylvania Station on the same day. The date for the sentence was fixed upon the recommendation of Dr. Rand that it was an appropriate time because he believed Mrs. Wolfson was in a period of remission. All counsel were informed of this. In short, the Court made a conscientious effort to deal compassionately with the problem of Mrs. Wolfson's illness.

ATTACHMENT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
NEW YORK, N. Y. 10007

CHAMBERS OF
EDMUND L. PALMIERI
DISTRICT JUDGE

July 24, 1975

Bernard Fensterwald, Jr., Esq.
Fensterwald & Ohlhausen
910 16th Street, N. W.
Washington, D. C. 20006

Robert Ullman, Esq.
Bass & Ullman
747 Third Avenue
New York, N. Y. 10017

Angus MacBeth, Esq.
Assistant United States Attorney
United States Attorney's Office
1 St. Andrew's Plaza
New York, N. Y. 10007

Re: United States v. Wolfson, 66 Cr. 720

Dear Sirs:

The voluminous papers filed by petitioner Louis E. Wolfson in his petition for a writ of error coram nobis, filed May 16, 1975, leave the unfortunate impression that they have been prepared with little familiarity with the underlying legal documents on which they are based. This creates a situation vastly complicating the burdens inflicted upon the United States Attorney as well as the Court.

The attorneys for the petitioner are requested to file an affidavit with the Court which will be annexed to the coram nobis petition and which will state the following:

1. A conscientious study has been made of all the relevant documents referred to in this petition.

2. The points made in the petition which have never been previously litigated or adjudicated are specified to be the following. The list should be accurate and complete.

3. The points referred to in the petition which have been the subject of litigation or adjudication are the following. This list should

To All Counsel
Re: United States v. Wolfson, 66 Cr. 720 July 24, 1975

not only be accurate and complete but should set forth the specific motions, briefs, decisions or adjudications in which the points have been previously made.

4. The points relating to the Continental Enterprises case are the following.

5. The points relating to the Merritt-Chapman case are the following.

Unless and until such a further clarifying statement is made, the Court is constrained to hold in abeyance any further consideration of this petition.

Very truly yours,

Edmund L. Palmieri
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RECEIVED
AUG 28 1975
FENSTERWALD AND OHLHAUSEN

UNITED STATES OF AMERICA,	)	
	)	
v.	)	66 Cr. 720
	)	
LOUIS E. WOLFSON,	)	
	)	
Defendant.	)	

PETITIONER'S REQUEST FOR RECONSIDERATION OF AND SUPPLEMENTAL MEMORANDUM ON MOTION FOR RECUSAL

On page 2 of its Answer, the Government states as its position that "no issues exist in the coram nobis petition which would in any justify calling Judge Palmieri as a witness." This is echoed by the Court at page 5 of its Order: "In sum, this Court cannot discern any issues which are appropriately before it in the coram nobis petition, and which would necessitate calling the trial judge as a witness." As a general proposition, petitioner wishes to note that it is not the prerogative of the Government to determine who the petitioner should not call as witnesses at an evidentiary hearing. Petitioner has raised broad constitutional questions as to due process, the right to counsel, and equal protection of the laws. He has indicated that he intends to call Judge Palmieri as a witness--something which he cannot do if the Judge is presiding. Only time will tell if the Judge's testimony does or does not support some of petitioner's contentions. However, no one will ever know unless Judge Palmieri recuses himself or is so ordered to do.

In the next sentence of its Answer, the Government rightly points out that "all notions of judicial economy and efficiency argue in favor of Judge Palmieri retaining the case since he is far more familiar than any other District Court Judge with other

issues raised in the coram nobis petition such as the alleged misconduct of the prosecution and the incompetence of defense counsel." It was this same notion of judicial economy and efficiency which contribut d heavily to the decision that Judge Palmieri should try the Merritt case as well as the Continental case. Yet the conviction in the Merritt case was overturned by the Court of Appeals, and petitioner was tried twice thereafter on the same charges.

It is petitioner's contention that "judicial economy and efficiency" should be balanced against due process and the appearance of due process. Judge Palmieri's familiarity with and emotional involvement in the facts and the minutae of the two cases is one factor that leads petitoner to ask the Judge to recuse himself and allow the Petition to be judged by someone not involved in the case for almost a decade.

Having denied that any issues exist, the Government then specifies three issues in which Judge Palmieri might be relevant as a witness.

1. The Grand Jury

Although Judge Cannella's name does appear at the top of the venire, petitioner would like to question Judge Palmieri with respect to any role that he might have played with respect to the empanelling of the grand jury, as well as his role in the placing of the name of Foreman McRitchie on the jury wheel from which the venire was drawn. Additionally, the grand jury of which Mr. McRitchie was foreman handed down only two indictments; petitioner was named as a defendant in both. What were the circumstances under which Judge Palmieri was assigned to both cases? Were the assignments by rotation or otherwise?

2. Judicial Bias and Prejudice

Petitioner did file an Affidavit of Bias and Prejudice in the Merritt case on May 8, 1968. New evidence of bias and prejudice has become manifest since that date; see, for example, Judge Palmieri's actions in December, 1968, re petitioner's sentencing in the Merritt case.

The Government states (p. 5) that: "It is hornbook law that a motion under Section 2255 or a petition for a writ of error coram nobis may not be used to relitegate matters already decided." This is echoed on page 6 of the Court's Order. However, the Government and the Court fail to add the cavaet "except in cases of newly discovered evidence." Fuller v. U.S., 182 562, 21 S. Ct. 871. Re Imbler, 60 Cal 2d 554, 35 Cal Rptr 293, 387 P2d 6; People v. Goodspeed, 223 Cal App 2d --, 35 Cal Rptr 743; Copeland v. State, 242 Omd 290, 176 NE2d 894, 178 NE2d 463; Hawk v. State, 151 Neb 717, 39 NW2d 561, cert den 339 US 923, 94 L ed 1346, 70 S Ct 612; Alexander v. State, 20 Wyo 241, 123 P 68.

As to the sentencing issue and Mrs. Wolfson's death, the Government complains that "no affidavit is supplied" and at a minimum petitioner must "set out the facts so they can be analyzed. The facts are set out on pp. 87-88 of the Petition, and the Petition is verified. To remedy any possible deficiency, there is attached hereto as Exhibit A a letter of December 13, 1968, from petitioner's then attorney, William O. Bittman, of Washington, District of Columbia, to petitioner, setting out the facts in minute detail. Petitioner wishes to question Judge Palmieri as to his reasons for insisting on petitioner leaving the bedside of his dying wife and coming to New York specifically on December 6, 1968 for sentencing--particularly in light of the fact that his co-defendant's sentencing was simultaneously postponed because of illness.

3. Paul Galvani

As to Paul Galvani, Judge Palmieri's law clerk, petitioner wishes to know his relationship to Judge Palmieri during the Continental trial which was held after the completion of his clerkship. As we shall demonstrate, supra, Mr. Galvani played a role in the Continental case as well as the Merritt case. After he became an Assistant United States Attorney did he discuss either the Continental or Merritt cases with his former employer?

On pages 7 and 8 of its Answer, the Government insists that the only "issues on which Judge Palmieri could be called as a witness are those relating to judicial bias and prejudice." The Government then makes the long leap to the proposition that "when a motion for recusal is made on the basis of judicial bias or prejudice it must be supported by an affidavit by a party to the proceeding and accompanied by a certificate of counsel of record stating that it is made in good faith." 28 U.S.C. 144.

This ignores the fact that petitioner wishes to question the Judge on a number of issues outlined supra. It further ignores that fact that such an affidavit and certificate were filed on May 8, 1968. Further, petitioner originally addressed his Petition to the Chief Judge, asking him under the cited federal and New York coram nobis precedents, to have the case assigned to any judge other than Judge Palmieri; such a procedural request does not come under 28 U.S.C. 144.

On page 8 of the Answer is this statement:

> "Finally, nothing in the statute recently passed on disqualification of judges or in the legislative history of that statute would change this conclusion or lead to any other conclusion on the underlying charges of bias or prejudice. 28 U.S.C. §455; House Report No. 93-1453, 3, U.S. Code, Congressional and Administrative News (93rd Cong., 2d Sees., 1974)."

The Government appears to be unaware of the very words of the new law. Subsection (a) reads as follows:

> "(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

The House Report to which the Government makes reference states (at p. 6354):

> "This sets up an objective standard, rather than the subjective standard set forth in the existing statute through use of the phrase 'in his opinion'. This general standard is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case. The language also has the effect of removing the so-called "duty to sit" which has become a gloss on the existing statute. See Edwards v. United States, (5th Cir. 1964) 334 Fed. 360. Under the interpretation set forth in the Edwards case, a judge, faced with a close question on disqualification, was urged to resolve the issue in favor of a "duty to sit". Such a concept has been criticized by legal writers and witnesses at the hearings were unanimously of the opinion that elimination of this "duty to sit" would enhance public confidence in the impartiality of the judicial system."

Under this new statutory provision and its legislative history, the present instance would appear to petitioner to be a classic one in which a judge should recuse himself. Not only is he required as a witness, but also it is a case in which his impartiality might very reasonably be questioned. And, after all, there are twenty-six regularly sitting judges in the Southern District who could handle the petition without bias or prejudice, actual or apparent.

4. Judge Palmieri's Letter of July 24, 1975

In addition to his order of July 23, 1975, denying Petitioner's Motion for Recusal, Judge Palmieri on July 24, 1975, sent a somewhat unusual letter to counsel of record. Although Judge Palmieri did not make this letter a matter of Court record, Petitioner takes this opportunity to do so by attaching it hereto as Exhibit B.

The thrust of the letter is that petitioner's present counsel are unfamiliar with the details of all of the enormous record in the Continental case and the several Merritt cases. As an indication thereof, Judge Palmieri points out counsel's failure to note the name of Judge Cannella at the top of a page of one exhibit to an affidavit filed in the Continental case. Counsel, being human, confesses error and apologizes to the Court, However, susceptibility to error is not confined to counsel alone. In his opinion of July 23rd (at pp. 6-7), Judge Palmieri makes this flat and unqualified statement:

> ...Moreover, as to the alleged "conflict of interest", the former law clerk did not participate in the Continental Enterprises case, and thus that claim is not relevant to the coram nobis petition.

However, some doubt is cast upon its accuracy by an affidavit of Mr. George B. Green of February 12, 1975, which appears as the very first exhibit appended to the Petition for Writ of Error Coram Nobis. Mr. Green states, inter alia, under oath as follows:

> "Sometime around the end of March, 1968, I received a telephone call at my home from Mr. Allen of the Securities and Exchange Commission and he told me that the Wolfson-Gerbert matter was coming up for trial and he wanted me to come to his office to discuss the matter I told Mr. Allen that if I were subpoenaed and a court reporter were present I would testify. On or about April

2, 1968, Mr. Allen again called me at my home and told me that if I would come down to his office to have my testimony taken he would provide a court reporter. I told Mr. Allen that I did not wish to have my testimony taken except under subpoena. On or about April 11, 1968, while I was at work I received a telephone call from Mr. Galvani of the United States Attorney's Office who told me that it was his understanding that I had refused to come to the United States Attorney's Office to have my testimony taken or to discuss the Wolfson-Gerbert matter unless subpoenaed. Mr. Galvani told me words to the following effect, "I have no hesitation about calling your employer and telling him that you have refused to cooperate in the Wolfson-Gerbert investigation unless subpoenaed and that he strongly suspected that I had committed perjury." Not wishing to discuss this further in the presence of fellow employees I asked him to give me his number and I would call him back within the next hour or so. He gave me his telephone number and about ten minutes later I called the number from a pay station and Mr. Galvani answered the telephone. I explained to Mr. Galvani that making his threatened statements to my employer would gain him nothing, that it would be extremely embarrassing to me and that I would still not come down to his office unless subpoenaed. On Monday, April 15, the Senior Partner of the brokerage firm where I was then employed called me into his private office and told me he had had a conversation with Mr. Galvani of the United States Attorney's Office and that he wanted me to immediately go down to be examined. I told my employer that I did not wish to testify without being subpoenaed because I felt there was a confidential relationship between myself and Mr. Gerbert who was a former customer of mine when I was with another brokerage firm and that this investigation did not involve my present employers at all. When I still insisted that I would not testify without a subpoena I was summarily discharged."

Furthermore, there is certain correspondence in the files of the United States Attorney for the Southern District which casts additional doubt on the proposition that Mr. Galvani played no role whatsoever in the Continental Case. (See Exhibit C appended hereto).

However, these matters are raised at this juncture, not to illustrate the propriety or impropriety of Mr. Galvani's role in the Continental case, but rather to show the difficulty of absolute accuracy with respect to a record of the size involved in the Continental and Merritt cases. Questions of fact, such as Mr. Galvani's exact role, are normally resolved in an evidentiary hearing on the merits, such as the one contemplated with respect to this present coram nobis petition.

However, from Judge Palmieri's letter of July 24th, it seems unlikely that an evidentiary hearing can take place. The letter requests a most complex affidavit from all counsel of record, presumably including New York counsel, stating, inter alia, that they have made "a conscientious study...of all the relevant documents referred to in this petition." Certainly this would include the many thousands of pages of record, exhibits, etc., in the Continental case and the three Merritt cases, the appeals thereto, etc. For New York counsel who have agreed to appear herein merely as local counsel for the filing and receipt of papers this would be an enormous and unduly burdensome task which would require many months. Furthermore, if either Washington or New York counsel have made errors, it is clear that they will be pointed out by the Government and taken into account by the Court.

The letter of July 21st, however, concludes: "Unless and until such a further clarifying statement is made, the Court is constrained to hold in abeyance any further consideration of this petition." Under the new and revised version of 28 U.S.C. 144, recusal is automatically required "in any proceeding in which his impartiality might reasonably be questioned." [Emphasis added]. Petitioner

states as emphatically as he can that this is a proceeding in which impartiality at least might reasonably be questioned.

Conclusion

Petitioner requests Judge Palmieri to reconsider his motion to recuse himself, and requests further that the Petition be assigned by rotation to another judge of the District for all future proceedings.

Respectfully submitted:

BERNARD FENSTERWALD, JR.

Fensterwald & Ohlhausen
910 - 16th St., N.W.
Suite 600
Washington, D.C. 20006
Tel: (202) 223-1667

ROBERT ULLMAN

Bass and Ullman
747 Third Avenue
New York, N.Y. 10017
Tel. (212) 751-9494

Attorneys for Defendant

HOGAN & HARTSON
815 CONNECTICUT AVENUE
WASHINGTON, D.C. 20006

December 13, 1968

Mr. Louis E. Wolfson
6466 North Bay Road
Miami Beach, Florida

Dear Lou:

Pursuant to our conversation of this date, Austin and I are furnishing you the following information for your confidential and private use.

Early in the afternoon on Monday, December 2, 1968, Dr. Harold Rand called me and told me that your wife's condition had taken a drastic turn for the worse, and he doubted that she could now live more than two more weeks. Dr. Rand had called me during the prior week; expressed his concern about Mrs. Wolfson's condition, and said he would call me Monday with an up-to-date report.

Dr. Rand asked me if it would be proper for him to call Judge Palmieri in New York in light of the sentencing then set for Friday, December 6. I told him that because of the nature of this information it was important that Judge Palmieri be informed, and I thought it would be appropriate for him to communicate this information directly to the judge. Apparently, Dr. Rand attempted to contact the judge but was unable to do so as the judge called me later that afternoon and asked if I knew why Dr. Rand was calling him.

I informed the judge that I had spoken with Dr. Rand who was intimately familiar with Mrs. Wolfson's condition and his prognosis was that she would not live more than two weeks; in fact, she was in effect living on a day to day basis. I told Judge Palmieri that Dr. Rand and I had discussed this matter earlier that afternoon and, because of the importance of this information, I thought that Dr. Rand should communicate it to him personally. I also mentioned

BEST COPY AVAILABLE

to the judge that since Mr. Wolfson does not fly, if the sentencing remained set for Friday there was a distinct likelihood that Mrs. Wolfson would die during the period of his absence. The judge asked me if I thought the sentencing should be postponed. I told the judge that I thought the sentencing should definitely be postponed; first, because of Mrs. Wolfson's imminent death and second, the fact that Mr. Wolfson was very distressed because of his wife's condition even though Mr. Wolfson had indicated to me sometime earlier that he was anxious to be sentenced as soon as possible. In response to a question by Judge Palmieri, I told him that Mr. Wolfson does not leave his wife's side and there was no doubt in my mind that if he left for New York to be sentenced Mrs. Wolfson would become aware of it. The judge said he was very much concerned and distressed about this information and told me that there was no necessity for Dr. Rand to talk to him. He stated he would call Paul Grand of the District Attorney's Office and have Paul Grand talk to the doctor after which the judge would be in a position to make a decision concerning the date of sentencing. I indicated to the judge that Mr. Wolfson was planning to depart by train Wednesday morning, and I would certainly appreciate it if I could be informed by tomorrow afternoon if the sentencing would be postponed. The judge thanked me for giving him this information and said that he would definitely be in touch with me by late tomorrow afternoon.

Austin received a telephone call from Irwin Sugarman, Judge Palmieri's law clerk, on Tuesday morning at approximately 10:30 A.M. Mr. Sugarman said that he had just spoken with Paul Grand with regard to the sentencing in your case. He said that Mr. Grand had spoken with Dr. Rand earlier that morning and it was his, Mr. Grand's, impression on the basis of this conversation that Mrs. Wolfson's condition had somewhat improved and that Mr. Wolfson was desirous of coming to New York to be sentenced Friday morning. The law clerk asked Austin if he had any information along these lines. Austin told him that he would contact you, discuss the matter, and then call the law clerk back. You will recall that Austin did speak with you Tuesday morning and, after a lengthy discussion, it was decided that it would be best for all parties concerned if you remained in Florida and did not come to New York for sentencing at this time. Austin told you that this information would be passed along immediately to Judge Palmieri's law clerk.

Austin called Mr. Sugarman back sometime between 12:30 and 1:30 P.M. and told him that there had been no significant change in Mrs. Wolfson's condition and that you did not want to come to New York on Friday to be sentenced. Austin told the law clerk that you were concerned because this matter had been pending for some time and you wanted to get it out of the way as soon as possible. However, he told Mr. Sugarman that if this decision was yours to make, you clearly did not want to leave your wife's side at this most critical time. Mr. Sugarman thanked Austin for this information and said that he would promptly advise the judge of your position.

The next time I spoke with Judge Palmieri was at approximately 5:15 Tuesday afternoon, December 3. The judge informed me that Paul Grand was on the extension phone. He then stated that he had been informed, according to Dr. Rand, that Mrs. Wolfson's condition was a little better than the day before. The judge said that he was very distressed and disturbed over the decision he had to make but, in view of all the circumstances, he felt that the sentencing should take place at 10 A.M. on Friday as originally scheduled. I told the judge that I would communicate this information to you and that you would be in New York on Friday as originally scheduled. As you will recall, I then called you and related the above.

Sincerely,

William O. Bittman

WOB/sr

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	
v.	66 CR. 720
LOUIS E. WOLFSON	

AFFIDAVIT OF PAUL B. GALVANI

Paul B. Galvani, being duly sworn, deposes and says:

1. I am an attorney associated with the law firm of Ropes & Gray, 225 Franklin Street, Boston, Massachusetts and have been since September 1970.

2. Between approximately September 1966 and February 1970 I was an Assistant United States Attorney for the Southern District of New York.

3. I did not participate in the trial, the motion for new trial, or the appeal of Louis E. Wolfson in this case (the Continental Enterprises case). In fact, to the best of my recollection, the only participation by me in this litigation occurred with respect to certain pre-trial motions which were heard and decided many months before the case went to trial. See 269 F. Supp. 621 (S.D.N.Y. 1967).

4. Any communications which I had with or about George B. Green were solely in connection with a subsequent

and unrelated litigation, United States v. Wolfson, 66 CR. 832 (the Merritt, Chapman & Scott case).

Paul B. Galvani

Paul B. Galvani

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. August 14, 1975

Then appeared before me the above subscribed, Paul B. Galvani, and made oath that he has read the foregoing affidavit, knows the contents thereof, and that the statements set forth therein are true.

Elisa M. Lopez

Notary Public
My Commission Expires:
ELISA M. LOPEZ, Notary Public
My Commission expires Nov. 22, 1979

RECEIVED
SEP 22 1975
FENSTERWALD AND OHLHAUSEN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED
SEP 16 1975
S.D. OF N.Y.

UNITED STATES OF AMERICA

-against-

LOUIS E. WOLFSON

65 Cr. 720

#43068

PALMIERI, J.

The motion for reconsideration is granted. The Court, after due reflection, adheres in all respects to its decision of July 23, 1975.

It is apparent that petitioner persists in seeking recusal without compliance with the applicable statute (28 U.S.C. § 144); and further that he seeks relief on the merits of the petition without regard for the many rulings made by the Court of Appeals and by this Court in the many facets of the underlying prosecution.

This Court has directed counsel for the petitioner (1) to make a conscientious study of the relevant documents referred to in the petition; (2) to make an accurate and complete list of the points made in the petition which have never been previously litigated or adjudicated; (3) to make

a similar list of the points which have in fact been the subject of litigation, or adjudication, identifying in each instance the specific motions, briefs, decisions or adjudications in which the points have been previously made, and (4) to distinguish between the points in the Continental Enterprises case and those in the Merritt-Chapman case by listing each separately.

Finally, counsel were advised that unless and until such a "clarifying statement is made, the Court is constrained to hold in abeyance any further consideration of this petition." The reasons for these directions were set forth in the decision of July 23, 1973.

The papers presently before the Court on the motion for reconsideration make it quite apparent that there is no intention to comply with these directions. The petitioner disposes cavalierly of the errors in the petition by stating in utter disregard of the massive records involved that "they will be pointed out by the Government and taken into account by the Court." It was precisely to avoid the imposition of this unconscionable burden upon the United States Attorney and upon the Court that these directions were formulated.

Furthermore this Court rejects the petitioner's suggestion that "under the new and revised version of

28 U.S.C. 144 [sic][1] recusal is automatically required" merely upon the filing of a petition. If the petitioner had support for this statement in this case, the floodgates would be opened to judge shopping; and an impressive body of precedent swept away. What is even worse, any person convicted of a crime could now subject the trial judge to the obloquy of public questioning as a hostile witness upon his ipse dixit and without any showing of a sufficient factual basis upon which this becomes necessary. It has already been pointed out (opinion of July 23, 1975, p. 7) that the prejudice with which a judge is charged for purposes of recusal must be derived non coram judice; and not a word in the motion would justify such a charge.[3] Indeed, the petitioner reveals his amorphous and speculative approach to this delicate matter by stating in his motion

---

1 Petitioner obviously refers to 28 U.S.C. § 455 which was revised in 1974 and reads in pertinent part:

> § 455(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

3 Petitioner states that a grand juror has stated he had a "slight acquaintance' with the trial judge. There is no affidavit by the grand juror. The opinion of July 23, 1975 (p. 3) states that the Court has no recollection of this grand juror and can find no evidence of any connection with him. But even if it were literally true, the Court is aware of no authority, nor has petitioner suggested any, for the proposition that this "slight acquaintance" would justify recusal or the grant of an evidentiary hearing.

papers that "only time will tell if the judge's testimony does or does not support some of petitioner's contentions." While this Court is sensitive to the necessity of avoiding all possible errors in criminal proceedings even after an exhaustive appellate process has been completed, it is none the less of some importance to the law-abiding community that judges be protected against a sniping process that can seriously interfere with the performance of their normal duties.

In any event, while the new and revised statute on judicial disqualification (28 U.S.C. § 455) broadens the grounds for recusal and is intended to eliminate the "duty to sit" concept, it has not changed the law to the extent petitioner suggests. The standard of the general disqualification provision, section 455(a), is still one of reasonableness and should not be interpreted to include a spurious or loosely based charge of partiality. The Senate Report, adopted by the House, makes this abundantly clear:

> While the proposed legislation would remove the "duty to sit" concept of present law, a cautionary note is in order. No judge, of course, has a duty to sit where his impartiality might be reasonably questioned. However, the new test should not be used by judges to avoid sitting on difficult or controversial cases.
>
> At the same time, in assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality

are in fact nothing to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a reasonable basis. Nothing in this proposed legislation should be used to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice. S. Rep. 93-419, 93d Cong. 1st Sess. 3 (1973); H.R. Rep. 93-1453, 93d Cong. 2d Sess. 5 (1974).

The directions hereinabove set forth must be complied with before this Court will deal with the merits of the petition. The proceedings will be held in abeyance for 60 days from the date of this opinion to abide compliance therewith. If upon expiration of this period there is a continued non-compliance with these directions, the Court intends to dismiss the petition.

EDMUND L. PALMIERI
U. S. D. J.

Dated: New York, N. Y.
September 16, 1975

File

A F F I D A V I T

BERNARD FENSTERWALD, JR., being duly sworn, deposes as follows:

1. As counsel to Louis E. Wolfson, affiant received a letter from Judge Edmund Palmieri, dated July 24, 1975, "requesting" the filing with the Court of a complex affidavit. [The letter is appended as Attachment A hereto.]

2. In an Order dated September 16, 1975, Judge Palmieri upgraded his "request" to a "direction." The Order concludes with the following sentence: "If upon expiration of this period there is a continued non-compliance with these directions, the Court intends to dismiss the petition."

3. There being an implication in the Court's "request" and/or "direction" that affiant had not diligently studied the record in this matter, affiant wishes to state that prior to the filing of the petition for writ of error coram nobis affiant had literally spent more than a hundred hours reviewing the voluminous files which were compiled by petitioner's previous attorneys and investigators, and which were gathered in a continuing investigation dating back prior to 1970. Affiant also attempted to fill gaps in the record by applying for files from the Department of Justice, Department of the Treasury, and the Securities & Exchange Commission under the Freedom of Information Act; however, affiant was singularly unsuccessful in this endeavor until the amended Freedom of Information Act became effective in March, 1975; as Exhibit B hereto explains, certain documents relating to this case have never been located by affiant even after a perusal of the files of petitioner, those available at the office of the U.S. Attorney in the Southern District, the Securities & Exchange Commission, and the Court.

4. Effective compliance with the "request" and/or "direction" would require affiant specifically to review the entire Court record in both the Continental Case (66 Cr. 720) and the three trials and appeals in the Merritt-Chapman and Scott Case (66 Cr. 832) in order to assure himself that he had seen the entire record in both cases.

5. Despite affiant's firm and oft-repeated position that the Court should recuse itself in this matter under the new and revised 28 U.S.C. §455, despite the unusual nature of the Court's request, and despite affiant's previous lengthy study of the case, affiant made a new and good faith effort over a full week to comply specifically with the Court's unusual "request" and/or "direction." The detailed reasons why affiant cannot sign the required affidavit are set forth in Attachment B hereto. In summary, the Court's records are in a complete state of shambles; records are literally dumped into thirteen boxes with no thought of continuity; many relevant documents are simply missing from the Court's files; certain documents are sealed by Order of the Court. And certain other crucial documents, such as the transcript of the April 10, 1952 SEC questioning of Wolfson and SEC's complete W557 files, have never been produced by the Government; they say that they no longer exist; however, it is affiant's position that the law requires that these files be maintained permanently.

6. A reading of the muddled and limited number of documents available in the official Court records in conjunction with certain documents only recently obtained by petitioner Wolfson under the Freedom of Information Act leads affiant to state that there is an additional subject upon which petitioner would propose to question Judge Palmieri at an evidentiary hearing on his writ of error coram nobis, i.e., the Court's handling of the excision of 3500 material. A legal memorandum on this point is appended as Attachment C hereto, and affiant requests that he

read this memorandum as a recently discovered adjunct to petitioner's urging that the Court recuse itself in order that the petition may be assigned to another judge at random, and that Judge Palmieri may be called as a witness.

7. In making his review of the extant official record in the Continental Case, affiant noted a number of additional indicia to show that Judge Palmieri's ex-clerk, Paul Galvani, participated actively throughout the case as an Assistant U.S. Attorney despite the Court's denial thereof in its Order of July 23rd (pp. 6-7). The indictment came down on September 19, 1966. Mr. Galvani became an Assistant U.S. Attorney on September 21, 1966. His name appears on Court documents as early as January, 1967, and thereafter throughout both the Continental and Merritt-Chapman and Scott Cases.

8. In view of all of the above, affiant has consulted with petitioner Wolfson and can state that it is petitioner's position that if Judge Palmieri now refuses to recuse himself, he hopes that he will dismiss the petition of error coram nobis promptly in order that the question of recusal may be appealed to the Court of Appeals.

Further, Affiant sayeth not.

B l Fensterwald, Jr.
BERNARD FENSTERWALD, JR.

Subscribed and sworn to before me this 7th day of November, 1975.

Judith A. Hartzell
Notary Public

My Commission expires on 7/31/79.

CERTIFICATE OF SERVICE

It is hereby certified that a copy of this Affidavit and Attachments were mailed to Assistant United States Attorney Angus McBeth, Office of the United States Attorney for the Southern District of New York, United States Courthouse, Foley Square, New York, New York 10007, on November 12, 1975.

BERNARD FENSTERWALD, JR.

ATTACHMENT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
NEW YORK, N. Y. 10007

CHAMBERS OF
EDMUND L. PALMIERI
DISTRICT JUDGE

July 24, 1975

Bernard Fensterwald, Jr., Esq.
Fensterwald & Ohlhausen
910 16th Street, N. W.
Washington, D. C. 20006

Robert Ullman, Esq.
Bass & Ullman
747 Third Avenue
New York, N. Y. 10017

Angus MacBeth, Esq.
Assistant United States Attorney
United States Attorney's Office
1 St. Andrew's Plaza
New York, N. Y. 10007

Re: United States v. Wolfson, 66 Cr. 720

Dear Sirs:

The voluminous papers filed by petitioner Louis E. Wolfson in his petition for a writ of error coram nobis, filed May 16, 1975, leave the unfortunate impression that they have been prepared with little familiarity with the underlying legal documents on which they are based. This creates a situation vastly complicating the burdens inflicted upon the United States Attorney as well as the Court.

The attorneys for the petitioner are requested to file an affidavit with the Court which will be annexed to the coram nobis petition and which will state the following:

1. A conscientious study has been made of all the relevant documents referred to in this petition.

2. The points made in the petition which have never been previously litigated or adjudicated are specified to be the following. The list should be accurate and complete.

3. The points referred to in the petition which have been the subject of litigation or adjudication are the following. This list should

To All Counsel
Re: United States v. Wolfson, 66 Cr. 720 July 24, 1975

not only be accurate and com 'ete but should set forth the specific motions, briefs, decisions or adjudications in which the points have been previously made.

4. The points relating to the Continental Enterprises case are the following.

5. The points relating to the Merritt-Chapman case are the following.

Unless and until such a further clarifying statement is made, the Court is constrained to hold in abeyance any further consideration of this petition.

Very truly yours,

Edmund L. Palmieri
U. S. D. J.

ATTACHMENT B

MEMORANDUM ON AFFIANT'S INABILITY
TO SIGN AFFIDAVIT AS REQUIRED BY COURT

In an effort to comply with the Court's specific direction of September 16, 1975, affiant came to New York and attempted to locate the complete official Court record in these cases in order to make a "conscientious study" thereof.

Upon application to the Office of the Clerk of Court, affiant was informed that all of the records in the Continental Case were stored at the Federal Records Center, Buiding 22, Marine Military Ocean Terminal, Bayonne, New Jersey. However, upon arrival at this Center on September 29, 1975, affiant was informed that, although the records in the Continental Case were normally stored there, they had all been checked out to Judge Palmieri and were no longer in New Jersey.

When affiant inquired of the Judge's clerk, Mr. Joseph Schmidt, he said that he did not believe that the Judge had the records and suggested that affiant recheck with the Clerk of Court.

Upon checking with Ms. Rose Fugnetti of the Clerk's Office, affiant was informed that Mr. Angus McBeth, an Assistant U.S. Attorney, had the Court records in both the Continental and Merritt Chapman and Scott Cases.

Mr. McBeth did indeed have the records and graciously permitted affiant to study them in his office from September 30 to October 3, 1975. The records were contained in thirteen (13) boxes, numbered 32832-37 and 230455-230462. [An inventory of the contents of these boxes is contained at the end of this memorandum.]

A check of the contents of the boxes against the docket entries in the cases indicates that a large fraction of the record in each case no longer appears to be extant in the Court's records

A docket entry of 5-24-68 is as follows:

> Filed Memo: Records produced by Asst. U.S. Atty. Paul Galvin [sic] are placed in the custody of the Clerk of the Court. Clerk to keep record of who uses these records.- PALMIERI.

Another entry of the same date is as follows:

> Filed Memo: I have recieved from Clerk of Court the records which were the subject of a direction of Hon. Edmund L. Palmieri, on May 24, 1968. They are in my office, Room 34A. Paul B. Galvani.

These records, whatever they may be, were not in the files available. Affiant could find no record indicating that Mr. Galvani returned the files to the Clerk.

Additionally, Ms. Ann Thompson, Room 602, advised affiant that there were still a large number of sealed files in the vault re both cases, but that she could not locate the relevant records relating to such sealed files.

From the records available in the Court's files, affiant believes that the following points have not been previously litigated or adjudicated:

a) The intimate relationship between the foreman of the grand jury and the Assistant U.S. Attorney who presented the case to the grand jury;

b) Was there an "enemies list" in SEC in the early 1960's and, if so, was defendant Wolfson on such a list;

c) The perjurious testimony to the grand jury of SEC employee Stuart Allen;

d) Did the grand jury take a formal vote as to a true bill;

e) Witness George B. Green was subjected to threats and fired from his job;

f) The jury was deliberately mislead as to defendant's role in an SEC investigation of Capital Transit in 1950-52;

g) Ineffective assistance of counsel;

h) Propriety of Attorney Glickstein appearing before grand jury and answering questions;

i) Possible conflict of interest on part of Assistant U.S. Attorney Paul Grand;

j) Possible conflict of interest on part of Mr. Arthur Liman;

k) Possible conflict of interest on part of Mr. Milton Gould;

l) Impermissible prosecutorial purpose.

From the records available in the Court's files, affiant believes that the following points have been previously litigated or adjudicated:

a) The intimidation of witness Henry Steger;

b) Discriminatory prosecution;

c) Change of venue; and

d) Judicial bias and prejudice.

There are at least three points which affiant believes have been previously litigated but only in part, and which became more important in view of the recently discovered evidence under the Freedom of Information Act:

a) The exact method or manner in which both the Continental and the Merritt-Chapman and Scott Cases originally got assigned to Judge Palmieri;

b) Use of perjured testimony; and

c) The conflict of interest of Paul B. Galvani.

It should also be noted that it is petitioner's view (as stated in his petition) that his constitutional right to a fair trial was not denied by any one particular "point", but that the totality of the denials clearly adds up to a lack of due process under law. Therefore, in petitioner's view, whether a particular

"point" has been adjudicated, not adjudicated, or adjudicated in part, is not governing. It is the totality of circumstances which should govern.

As to points 4 and 5 of the Court's letter of request of July 24, 1975, affiant does not find it feasible to assign most "points" to either the Continental Case (66 Cr. 720) or the Merritt Chapman and Scott Case (66 Cr. 832) exclusively, as most "points" apply in one degree or another to both cases. Not only was this frequently and explicitly admitted by the Court in its handling of the two cases [see, for example, 269 F.S. 621], but also the physical records of the two cases are intertwined from their inception.

An inventory of the Court's files in the Continental and Merritt-Chapman and Scott Cases follows:

INVENTORY OF RECORDS IN
66 CR 720 AND 66 CR 832

BOX NO. 32832 (9073633)

Transcript Sept. 15, IP, 19, 20, 21 of 1967 (p.881-1720).
" Sept. 27 -do- (p.2096-2294).
Judgment vs. Wolfson, filed Nov. 28, 1967.
Judgment vs. Gerbert, filed Nov. 28, 1967.
Miscellaneous exhibits relating to the Harding-Jones Paper Co., dated September, 1968.
Notice of Motion for New Trial, filed Oct. 9, 1968.
Affidavit of Paul R. Grand, dated Nov. 5, 1968, filed Nov. 6, 1968.
Motion for Discovery and Inspection, dated Nov. 7, 1968 filed Nov. 8, 1968, with Memorandum of Points and Authorities.
Government's Proposed Findings of Fact, dated Nov. 25, 1968, filed Dec. 3, 1968.
Judge Palmieri's opinion in denying Motion for New Trial; Order dated Dec. 2, 1968.
Affidavit of Thomas W. La Venia, filed Dec. 3, 1968.
Affidavit of Edgar Brenner, filed Dec. 3, 1968.
Affidavit of A. Mittler, filed Dec. 3, 1968.
Affidavit of Wm. Bittman, filed Dec. 3, 1968.
Movant's Response to Government's Proposed Finding of Fact, filed Dec. 3, 1968, submitted by Krier and Bittman.
Notice of Appeal dated Dec. 11, 1968.
Stipulation on Appeal, signed Jan. 20, 1969.
Certification of Record, filed Jan. 20, 1969.
Gerbert Bond of $500,000, filed Jan. 21, 1969.
Order of District Court affirmed by CCA, entered 8/8/69.
Bill of Costs, dated Aug. 29, 1969, filed Oct. 1, 1969.

Undated:

Supplemental charges to jury on behalf of Gerbert.
Miscellaneous Correspondence.

BOX NO. 32833 (9073634)

Transcripts: Sept. 6, 1967
Sept. 11, 1967
Sept. 12, 1967
Sept. 13, 1967
Sept. 14, 1967
Sept. 18, 1967
Sept. 19, 1967
Oct. 6, 1967
Nov. 18, 1968
Nov. 19, 1968

BOX NO. 32834 (9073635)

Transcripts as follows:

Oct. 5, 1966: Arraignment (Judge Bryan).
Nov. 30, 1966: Arguments on Motions re Bill of Particulars and Change of Venue (Judge T
May 25, 1967: (All off the record). (Judge Cannella).
Aug. 14, 1967: Setting trial date for Merritt-Chapman and Scott Case (Judge Cannella).
Aug. 14, 1967: Pre-trial Conference in Continental Case (Judge Palmieri).
Sept. 5, 1967: Pre-trial Conference (Judge Palmieri).

BOX NO. 32834 (9073635) [continued]

Sept. 13, 1967	:)	
" 14 "	:)	
" 20 "	:)	
" 21 "	:)	Trial Transcript (in part)
" 25 "	:)	
" 26 "	:)	
" 28 "	:)	
Oct. 6, 1967	:	Argument on Motions for New Trial. All motions denied - sentencing set for 11/28/67.
Nov. 27, 1967	:	Argument (Bedell) on Motion to set aside based on American Motors matter.
Nov. 28, 1967	:	Motions for New Trial and Postponement of Sentencing denied. Sentencing took place on this date.
Nov. 7, 1968	:	Hearing on Motion for Evaluating Hearing
Nov. 12, 1968	:)	
" 15 "	:)	
" 18 "	:)	Evidentiary Hearing
" 19 "	:)	

BOX NO. 32835 (9073636)

Transcripts as follows:

Jan. 31, 1967	:	Argument on Motions (Judge Cooper).
Apr. 7, 1967	:	Argument about trial date (Judge Palmier)
Apr. 24, 1967	: 1)	Motion on Composition of Grand Jury
	: 2)	Motion on Names and Addresses of Witnesses
	3)	Motion on Change of Venue to Florida
	4)	Motion on Armstrong's Handling of Prospective Defendants Before Grand Jury.
	5)	Substantive Legal SEC Issues
	6)	-do-
Sept. 15, 1967	:)	
" 26 "	:)	
" 27 "	:)	Trial Transcript
" 28 "	:)	
" 29 "	:)	
Nov. 7, 1968	:	Setting date for evidentiary hearing.
Nov. 12, 1968	:)	
" 13 "	:)	Evidentiary Hearing
" 20 "	:)	

BOX NO. 32836 (9073637)

Transcripts as follows:

Nov. 7, 1968	:	Setting date for evidentiary hearing.
" 13 "	:)	
" 15 "	:)	
" 18 "	:)	Evidentiary Hearing
" 19 "	:)	

BOX NO. 230455

Sept. 19, 1966	:	Indictment (original and copies).
Oct. 14, 1966	:	Gould Affidavit re Bill of Particulars and other matters.
Oct. 21, 1966	:	Notice re Motion on Removal to Florida, to be called up Oct. 31, 1966. (With attached affidavits and exhibits
Nov. 30, 1966	:	Armstrong Affidavit in Response to Defendants' Motion for Change of Venue or Continuance and a Bill of Particulars, plus 6 exhibits.
Dec. 13, 1966	:	Opinion of Judge Tyler on Defendants' Motions re Bill of Particulars, Change of Venue.
Mar. 29, 1967	:	Notice re Motion to Dismiss on 5th Amendment Grounds, to be called up on April 17, 1967. (With attached affidavits and exhibits).
Apr. 6, 1967	:	Bill of Particulars.
Apr. 7, 1967	:	Notice re Motion to Dismiss because of Grand Jury Selection and Composition, to be called up on April 17, 1967 with attached exhibits and affidavit. See Cannella - Also Kunstler depositions in Naphtali case.
Apr. 7, 1967	:	Notice re Motion on Names and Addresses of Witnesses, to be called up on April 17, 1967. (With attached affidavits and exhibits).
Apr. 10, 1967	:	Notice of Motion re 1)no offense and 2) unconstitutionality vague (Filed 4/10/67).
Apr. 13, 1967	:	Amended Bill of Particulars.
April 24, 1967	:	Affidavit of Armstrong in Opposition to Defendants' Motion to Dismiss and Change Venue. Filed May 18, 1967.
May 18, 1967	:	Judge Palmieri dismissed various pending motions re 1) selection of grand jury; 2) conduct of Armstrong before grand jury; 3) demand for list of witnesses; 4) transfer of trial to Florida; 5) dismissal of substantive counts; 6) dismissal of indictment.
May 19, 1967	:	Amended Bill of Particulars. Filed on Aug. 30, 1967.
Nov. 22, 1967	:	Notice of Motion re Newly Discovered Evidence to be heard Nov. 27, 1967. Affidavits and Exhibits attached.
Nov. 28, 1967	:	Wolfson Notice of Appeal.
Nov. 28, 1967	:	Sentencing of Gerbert.
Nov. 28, 1967	:	Sentencing of Louis Wolfson.
Nov. 28, 1967	:	Sentencing Transcript
Nov. 28, 1967	:	Bond of $850,000.
Dec. , 1967	:	Notice of Appeal, signed Gould.
Mar. 15, 1968	:	Affidavits of Armstrong, dated Feb. 27 and Mar. 16, 1967, are made part of formal record.
Oct. 9, 1968	:	Appearance of John J. O'Lear, Jr.
Nov. 25, 1968	:	Proposed Findings and Conclusion by Wolfson and Gerbert. Filed Dec. 3, 1968.
Nov. 27, 1968	:	Movants' Response to Government's Proposed Findings of Fact in Exhibit 21 Matter.

BOX 230456

Primarily.Motions Papers.

BOX 230457

CCA Volumes I, II, IV, X, XII, XIII, XIV, XX, and XXIII.

BOX 230458

Transcript of 5/11/67 (Judge Cooper) re technical legal matters in indictment, etc.
Transcript of 4/23/68 re discovery.
Legal Memo of 8/6/68 by Kosow objecting to the Government's requests to change.
Transcript of 12/6/68 - Sentencing of Wolfson.
Transcript of 6/28/71 re assignment of 2nd trial to Judge Wyatt as a result of Simon case.
Notice of Motion of 8/24/71 by Staub for severance and other purposes.
Notice of Motion of 8/30/71 by Wolfson adjourning trial date. Order attached.
Motion of 8/30/71 of substitution of E.B. Williams as Wolfson's attorney.
Notice of Motion of 9/8/71 of Gerbert for severance and dismissal of Counts I and III. Order attached.
Notice of Motion of 9/10/71 of Kosow for acquittal or severance.
Notice of Motion of 9/10/71 by Kosow for scientific tests to be made. Order attached.
Affidavit of Harold McGuire, dated 10/1/71 responding to pretrial motions.
Notice of Motion of 10/6/71 by Wolfson for acquittal as to Count I. Order attached.
Reply Memo of 10/6/71 of Gerbert re pretrial motions.
Reply Memo of 10/8/71 by Kosow re disclosure.
Notice of Motion of 10/10/71 of Kosow for dismissal of indictment because of amendments. Order attached.
Order of 10/18/71 denying Wolfson to have other's motions apply to him; right to file in ten days granted.
Letter of 10/21/71 from Califano to Judge Wyatt re conflict.
Notice of Motion to sever Gerbert, 10/22/71.
Order of 11/1/71 denying Gerbert's second motion to sever.
Memo of 11/10/71 of Wolfson in support of motion to supplement the record.
Notice of motion of 11/10/71 by Wolfson to supplement the record.
Statement of 11/30/71 by Gerbert re Wolfson's Motion to supplement the record.
Transcript of 12/14/71 - Gerbert-Califano matter. Possible conflict of interest.
Transcript of 1/24/72 - argument on motion.
Trial Transcript of April 21, 1972.
Trial Transcript of April 26, 1972.
Transcript of 5/25/72 re assignment of third trial to Judge Wyatt.
Transcript of 8/21/72 re trial date.
Transcript of 9/11/72 re dismissal of a subpoena, motions for acquittal, etc.
Transcript of 11/30/72 - Resentencing of Gerbert.
Transcript of 11/30/72 - Resentencing of Wolfson.
Rifkird letter of 12/7/72 re pre-sentencing report on Kosow.
Wyatt order of 12/7/72 rejecting Kosow request for another judge, since he had not tried Kosow previously.
Transcript of 12/8/72 - Kosow asks for new judge.

BOX 230458 (continued)

Undated Files:

Documents relating to voir dire of petit jury.
Memoranda re dismissal of indictment.
Memorandum of Law re resubmission of Rittmaster's testimony.
Vol. XI of record to CCA - Transcript pp. 2760-3064.

BOX 230459

Exhibits A thru Q-7 to Alenstein Affidavit of Jan. 5, 1967 in support of Motion for Change of Venue.
Transcript of Trial - 7/11/68
Transcript of Trial - 8/1/68
Objections of 8/6/68 by Kosow to Government's requests to charge.
Gerbert's Proposed Questions on Voir Dire - 4/12/72
Wolfson's " " " " " - 4/13/72
Vacation of subpoena vs. John Morley - 4/14/72
Vacation of subpoena vs. Archibald Kleven - 4/14/72
Government's Proposed Examination of Prospective Jurors - 4/17/72
Memo in support of Gerbert's Motion for Acquittal as to Counts IV & V, filed 4/17/72.
Memorandum re instructions of Wolfson and Gerbert - 4/28/72.
Gerbert's additionalrequests for instructions - 5/1/72.
Wolfson's additional requests to charge - filed 5/4/72.
Supplemental Requests to Charge by Gerbert, dated Oct. 3, 1972, filed Oct. 3, 1972.
Memorandum of Wolfson & Gerbert in opposition to Government's Requests to Charge, filed Oct. 3, 1972.
Sentence of Wolfson - 11/30/72.
Sentence of Gerbert - 11/30/72.

Undated Files:

Defendant Gerbert's request to charge.
Government's Request to charge.
Kosow's additional requests to charge.
Kosow's request to charge.
Court Exhibits Nos. 1, 5, 7, 8, 9, & 11.
Miscellaneous statistical exhibits.
CCA Vol. XXVI.
CCA Vol. IX.

BOX NO. 230460

CCA Vol. III
" " V
" " XIII
" " XIV
" " XXII
" " XXIV

BOX NO. 230461

Transcript of Hearing of May 2, 1968.
Trial Transcript of June 17, 19, 21, 26, 27, 1968.
Trial Transcript of July 1, 2, 30, 31, 1968.
Trail Transcript of Aug. 5 and 7, 1968.

BOX NO. 230462

Transcript of Hearing - 2/26/68 (primarily re discovery)
" " " - 4/24/68
" " " - 5/24/68
Trial Transcript - June 6, 18, 20, 21, 24, 26, 27, 28, 1968.
" " - July 1, 25, 26, 29, 1968.
" " - Aug. 6, 1968.

BOX NO. 230463

CCA Volume VI
VII
VIII
IX
XV
XIX
XXI
XXV

Hearing Transcript - Jan. 31, 1967 (Judge Cooper)
-do- - Feb. 26, 1968 (Judge Palmieri)
-do- - Apr. 23, 1968 (Judge Palmieri)
-do- - May 3, 1968 (-do-)
Trial Transcript - June 19, 1968 (Judge Palmieri)
-do- - June 24, 1968 -do-
-do- - July 11, 1968 -do-
Hearing Transcript - Jan. 21, 1969 -do-
-do- - Oct. 13, 1971 (Judge Wyatt)

ATTACHMENT C

LEGAL MEMORANDUM ON EXCISION OF 3500 MATERIAL

It should be stated at the outset that this memorandum is being filed at this late date only because certain key documents were only obtained and analyzed in the summer and fall of 1975, under Freedom of Information Act requests. The documents, which shall be described below, came from SEC files labeled W525, an investigation of the old Capital Transcit Co. of Washington, D.C. It is petitioner's position that these SEC documents, many of which are missing, are directly relevant to issues raised in the original petition for writ of error coram nobis. It was only unusual diligence, not lack thereof, which permitted petitioner to discover--although some eight years after his trial--that, if crucial material had not been excised from the 3500 material, he probably never would have been convicted and sent to jail.

IMPORTANCE OF MORLEY AND "EXHIBIT 21"

Throughout the whole very lengthy history of the Continental Case, it has generally been conceded by both sides that a single witness, Mr. John Morley, and a single trial exhibit, "Exhibit 21", an eight-page memorandum dated October 16, 1950, spelled the difference between conviction and acquittal of petitioner Wolfson.

Morley was important because he had been chief stock broker to defendants Wolfson and Gerbert for many years prior to the grand jury investigation and indictment in 1966. He was a star Government witness, not only before the grand jury, but at the trial itself. To emphasize the importance of Morley, the following excerpt is from the Court's charge to the jury:

> There is that conversation with Morley. Because in this case-and there is no hiding the fact that Morley is a very important witness, because a great many details of significance have been testified to by Morley and denied flatly by the defendants.
>
> You have to decide-it is going to be one of the important responsibilities you will have in this case, to decide whether you believe Morley on the one hand or whether you believe Gerbert or Wolfson on the other hand, because depending upon which one of these witnesses you believe it will take you a considerable way on the road to deciding the controverted issues in this case.
>
> You will remember that Morley testified that in 1958 he had a conversation with Wolfson. It wasn't apparently a particularly pleasant conversation. Over the application of the registration requirements on his stock in American Motors Corporation and that in the course of th[illegible]rgument (2557) Mr. Wolfson asked Mr. Morley if he th[illegible]ght his lawyers were better than Wolfson's. Mr. Wo[illegible]on denies this conversation ever took place. Mr. Morley was quite specific about that conversation, what led to it, what was said, and what he warned Wolfson about. Wolfson denies it.
>
> There you have one of the many points of conflict between Morley and these defendants, and you will have to resolve these conflicts.

Thus, one of the key questions for the jury was to weigh Morley's credibility as against petitioner's.

The direct testimony on the Morley-Wolfson conversation re Ameri[illegible]n Motors stock was given on September 12, 1967, at pp. 377-386 of the trial transcript.

Immediately following Morley's direct examination, the Court disposed of the "3500 material" with respect to Morley, the most important document being Exhibit 3504A, the 105-page transcript of a formal and sworn [illegible]ession that the SEC had with Morley on October 18, 1965. Pages 464-469 of the trial transcript relates to this matter of excision. The prosecutor requested the excision of pages 2, 5-9, 12-36, 41-50, 78-93 and 95-105. The Court agreed to all of the excisions except that of page 3, which stated in part that Morley was represented by counsel.

Thus, in summary fashion, did the Court permit the excision of extremely important pages of a key document which was central

to the entire case. The decision to agree to the excisions was wrong on its face because it hid from the defendants the fact that Morley had testified in 1965, inter alia, about American Motors not only falsely, but in a manner which completely contradicted his testimony that very day in Court.

As Morley's testimony at the trial shows, his excised SEC testimony was clearly perjurious on a crucial point: Morley and A. M. Kidder handled a high volume of Wolfson's dealings in American Motors.[1/] If the Court in fact read the material which it permitted to be excised, it is difficult to see how it could have permitted the excision of page 86. With it in hand, the defense could have destroyed Morley's credibility in the eyes of the jury, particularly with respect to the American Motors matter--something which the Court in its charge said was key to the jury's decision.

Before going on to the importance of other excised material, it should be noted that copies of the excised and sealed pages were obtained by different attorneys for Wolfson during the Merritt-Chapman and Scott Case.

IMPORTANCE OF EXHIBIT 21

The most difficult point in the Government's case was to show knowledge of the details of the relevant SEC requirements as to registration on the part of defendants Wolfson and Gerbert. The

---

1/ It should also be noted in passing that Morley's statement in 1967 that his brokerage in American Motors for Wolfson stopped on January 7, 1958, was also perjurious in that he handled American Motors stock for Wolfson after this date. However, as Wolfson's entire files on American Motors were in Florida, defense attorney Gould was unable to cross-examine Morley on this to test his credibility. The question of the accuracy of Morley's testimony and the question of the fairness of allowing introduction of substantive evidence relating to American Motors were presented to the Court in a motion for a new trial argued by Attorney Bedell, who was unaware of the excisions re American Motors; the motion was denied forthwith by the Court.

Government relied heavily on a single witness, Morley, in constructing a case for "warnings" and "guilty knowledge." However, to buttress their case, the Government sprang an obscure rebuttal witness, John Duncan. Mr. Duncan was an elderly man, long retired, and with exceedingly poor sight. His role was to identify a memorandum of a conversation between defendant Wolfson and SEC lawyer, Mr. E. Russell Kelly, long since dead. The conversation took place on October 16, 1950, some seventeen years before Duncan testified. Yet, Duncan, who had retired from the SEC, was denied the right to refresh his memory by reviewing the W525 and W557 files. Thus, Duncan, who had set in on only a part of the meeting, verified that it had taken place as Kelly described in the memorandum, and purported to verify Kelly's signature.

As Wolfson's lawyers had never heard of Mr. Duncan or the memorandum, they were not in a position to effectively cross-examine Mr. Duncan. The purport of the testimony was that, in 1950 in connection with an investigation of the Capital Transit Co., Wolfson had had a meeting with Mr. Kelly who explained the requirements for registration under the SEC Acts. Again, Wolfson's lawyers were taken by surprise and incapable of putting Duncan's testimony and Kelly's memorandum in context. Had they been put in context then--as we have managed to do since and are prepared to do in detail at an evidentiary hearing and by use of Government documents--the testimony would have been worthless, as Wolfson had not sold any unregistered Capital Transit stock and the meeting in fact related to "manipulation" and not to "registration", all of which was well known to the prosecutors. In fact, petitioner Wolfson and a colleague, Doran Weinstein, voluntarily came into the SEC to discuss rumors of stock manipulation in stock of the Capital Transit Company of which they were principals. Wolfson was not under investigation at that time.

However, the point again is that, if the Court had not agreed to the excision of crucial parts of Morley's 1965 SEC transcript, Wolfson's attorneys would have been prepared for the surprise testimony of Duncan, because the SEC specifically examined Morley with respect to the 1950 Capital Transit investigation. For example, at page 89 of the transcript, we have this exchange between the SEC and Morley:

> Q. I want to show you this document from our files which is on the letterhead of A. M. Kidder and Company, dated November 1, 1950, and it is an important memorandum to partners, branch office managers and registered representatives and department heads re violation of Act of 1933.
>
> I wonder if you recall seeing that memorandum?
>
> A. Yes, sir.
>
> Q. Did that memorandum come about as a result of the Commission's inquiry into transactions in Capital Transit Company?
>
> A. It might have.

And earlier (at p.88) the SEC showed Morley another of its documents:

> Q. I want to show you a letter from our files dating back to January 11, 1951, addressed to A. M. Kidder and Company, and I am referring to sales of Capital Transit stock for the account of Saul Wolfson, Cecil Wolfson and Sam, and something called the WYG Venture, and ask you if that refreshes your recollection to any transaction?
>
> A. Sure, that was only 6,984 shares, and it was scattered among all of them, over that year, and I am quite sure that the SEC had checked that.
>
> In fact, I see this addressed to them at 1 Wall Street, and I didn't know about this letter. So evidently New York handled the whole thing with the SEC.

Copies of these letters out of the SEC files, which were shown to Morley in 1965, were unknown to defendants at time of trial; and they are both central to the testimony of both Morley and Duncan. Copies of these letters, which were obtained by Wolfson in 1975 under the Freedom of Information Act, are appended hereto.

The November 1, 1950, memorandum, which was shown to Morley in 1965 out of the SEC's files, was on A. M. Kidder stationery, addressed to "partners, branch office managers, registered representatives, and department heads," and signed by A. M. Kidder. It was occasioned by the SEC investigation of Morley and A. M. Kidder with respect to the trading in Capital Transit stock--an investigation designed as W525 by the SEC. No copy of the memorandum went to Wolfson or his associates, but rather it was sent to Morley and his associates. On Page 1 we find the crux of the memorandum, as follows:

> Furthermore, the SEC may also proceed to revoke our registration as a broker-dealer and perhaps recommend criminal prosecution of the partners and employees.
>
> Therefore, in order to protect the firm and its customers against violations of Section 5 of the 1933 Act, it is imperative to have certain factual information about our customers and to be familiar with what the S.E.C. means by "control" and "distribution."

Thus, it is explicitly recognized by A. M. Kidder that Section 5 is primarily directed toward broker-dealers who, in turn, are to protect their customers by seeing that they adhere to the SEC's technical requirements for such things as registration. Yet, after this explicit warning in 1950, Morley and Kidder continued to sell blocks of stock for Wolfson and his associates in various "controlled" corporations through the 1950's and into the 1960's, apparently in violation of the SEC regulations; however, Wolfson became the defendant and Morley, the star witness for the prosecution. And this could not have stood unchallenged except for the cooperation of the Court in the excision of 3500 material. If defense lawyers had seen Page 89 of Morley's testimony, and the reference to the November 1, 1950, memorandum, the whole subject of the 1950 Capital Transit investigation would have been opened, and the defense would have known of the Government's hidden recognition of the relative "guilt" of Wolfson, the defendant, versus

Morley, the prosecution witness. Morley and Kidder were cited in 1950-51 for breaking the same regulation for which Wolfson was indicted and tried in 1966-67.

Reference to the January 11, 1951 letter from the SEC Chairman to A. M. Kidder was also excised and is more of the same. In effect, it condemns Kidder (i.e., Morley) for the sale of Capital Transit stock in violation of Section 5 of the Act of 1933, but lets the firm off with a slap on the wrist. In whitewashing this matter, the Chairman of the SEC had to go over the head of the New York Regional Office. However, Morley and Kidder were warned as to the future. Wolfson, on the other hand, received no such warning letter from the SEC, and the W525 file was formally closed as to Wolfson and Capital Transit on November 1, 1950, with no action recommended against Capital Transit Company or Wolfson's associates; Wolfson himself was not under investigation. In his summation to the jury, Prosecutor Armstrong harped on this false and fraudulent theme, 'Wolfson got away with it in 1950; you aren't going to let him off again.' Yet, Armstrong knew full well that Wolfson was not a target of this investigation.[2/]

Had Wolfson and his attorneys been aware of these pieces of excised correspondence, they would have demanded production of them, and then they would have been aware of the whole W525 file at a time when it could have been used for their defense--not eight years later in conjunction with a coram nobis. In fact, production alone of the two named documents would have pretty well demolished

2/ That the thrust of the SEC investigation was toward manipulation and not toward registration is made clear in a letter dated Sept. 28, 1950, from E. Russel Kelly to Mr. William Green, Regional Administrator in Atlanta; this letter was obtained in the summer of 1975 under the FOI Act.

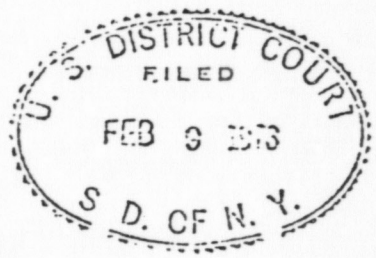
the Government's case. However, it is clear that the prosecutors and the Court kept them in ignorance as to the W525 file from which the Kelly memorandum was extracted and used so fraudulently and devastatingly by the prosecution via rebuttal witness Duncan. 3/

In an evidentiary hearing, petitioner Wolfson would use the above as evidence relating to these points: 1) Morley's credibility; 2) Wolfson's "non-involvement in the 1950 investigation; and 3) excision of 3500 material. Petitioner Wolfson believes that in such an evidentiary hearing, he should have a right to ask Judge Palmieri how he could have agreed to the excisions of Morley's SEC testimony in view of Morley's immediately preceding testimony and the importance attached to the 1950 SEC investigation.

3/ It is clear now that in the light of the 1950-51 SEC warning to Kidder and Morley, and in view of subsequent sales by Kidder and Morley of controlled stock through the early 1960's the Government could have proceeded criminally against both Kidder and Morley; they opted to exchange his testimony, much of which was perjurious, for a guarantee of immunity. If anyone were guilty of a knowing violation of Section 5, it was Morley. In this connection, please note another letter which was obtained recently under the Freedom of Information Act; this from Kidder to SEC, dated Jan. 12, 1951, thanking SEC for letting them off with a warning; this letter is also appended hereto.

CR 169 MEMO 548

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



----------x

UNITED STATES OF AMERICA

66 Cr. 720

4194

-against-

LOUIS E. WOLFSON

----------x 71/43356

PALMIERI, J.

On May 16, 1975, defendant Wolfson filed a petition for a writ of error coram nobis. The voluminous papers filed with that petition gave the unfortunate impression that they were prepared with little familiarity with the underlying legal documents on which they were based. In order that this petition not place an improper and untoward burden on the United States Attorney and this Court, petitioner's attorney was requested to review all relevant documents and to submit an affidavit that would greatly clarify the matter. This direction was repeated in an Order dated September 16, 1975.

Petitioner's attorney submitted an affidavit dated November 7, 1975. It appears from this affidavit that he has made an effort to review the relevant documents. However, the affidavit does not satisfy all the

original directions and makes it necessary to reiterate them with a slight expansion.

The first directive required the attorney to submit an affidavit stating that "a conscientious study has been made of all the relevant documents referred to in this petition." The attorney says he is unable to do so because some of the documents are not available. Assuming this to be the case, the Court directs that the attorney submit an affidavit stating that a conscientious study has been made of all relevant documents referred to in the petition that are available. It should further state: (1) which such documents are not available; (2) which of these unavailable documents are listed on the court clerk's docket sheet as part of the official record, and how they are there described; and (3) why each of these is unavailable, for example, (a) it is missing from the court clerk's files and is <u>not otherwise available</u> to the petitioner; (b) it has been ordered sealed by this Court; or (c) it is not part of the official record but is held by a federal agency, to be named, which has refused to release it to the petitioner.

This will clarify what documents, if any, are actually missing or misplaced. It will assist in the location of these documents. And it will help to clear this petition of collateral issues.

It should be noted that petitioner's attorney has failed to comply with the direction to set forth the specific opinions of this Court and of the Court of Appeals and the specific papers wherein the matters he has listed as previously litigated were dealt with.

The directions further required petitioner's attorney to designate which of two cases the allegations are based on. In Attachment B to his affidavit of November 7, 1975, the attorney states that "affiant does not find it feasible to assign most 'points' to either the Continental case (66 Cr. 720) or the Merritt Chapman and Scott case (66 Cr. 832) exclusively, as most 'points' apply in one degree or another to both cases." The Court cannot accept this facile attempt to evade its directions which had a quite serious purpose. As petitioner himself noted in his petition, a writ of error coram nobis is an extraordinary remedy "for the purpose of reviewing, correcting, or vacating a judgment." Since there was no conviction or judgment in the Merritt-Chapman case, a coram nobis petition could not be properly availed of in that proceeding. Petitioner appears to have recognized this by filing his petition only in the Continental case. He nevertheless persists, despite the strictures of this Court's Order of September 16, 1975, in making wide ranging contentions allegedly based on two

voluminous records only one of which resulted in a judgment of conviction. Allegations that relate solely to the one case cannot properly be considered in a petition in the other. Thus it is important that petitioner designate which of the two cases his specific allegations relate to.

A heavy burden is placed on the United States Attorney as well as the Court by the petition. The petitioner has given expression to his desire for a prompt disposition, but he must give the Court and the United States Attorney effective cooperation by complying with the Court's directives which are based upon the Court's attempt to keep this matter within appropriate and manageable compass.

It is so ordered.

Edmund L. Palmieri

EDMUND L. PALMIERI
U. S. D. J.

Dated: New York, N. Y.
February 9, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

United States of America	X	
-v-	X	
Louis E. Wolfson,	X	66 Cr. 720
Defendant.	X	
	X	

New York, N. Y.

February 19, 1976

3:30 pm

Room 2003

Before:

Hon. Edmund L. Palmieri,

District Judge.

A P P E A R A N C E S:

Fensterwald & Ohlhausen, Esqs.,
and
Bass, Ullman & Lustigman, Esqs.,
Attorneys for Louis E. Wolfson,
Petitioner.
Bernard Fensterwald, Jr., Esq. and
Robert Ullman, Esq., of counsel.

- - -

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. — 791-1020

THE COURT: I have here three items: an envelope, a 2-page letter dated January 14, 1976 from Louis E. Wolfson, and a 27-page attachment.

Please mark these as court's exhibits 1, 2 and 3.

(Marked Court's exhibits 1, 2 and 3)

THE COURT: Gentlemen, before attending in my chambers this afternoon I had my law clerk hand you Court's exhibits 1, 2 and 3, and asked him to have you read them before coming before me.

Have you done so?

MR. FENSTERWALD: Your Honor, I had seen these documents previously; Mr. Ullman had not.

THE COURT: I am sorry to interrupt you but I would appreciate it if you would answer my questions first, and then I will give you an opportunity to make whatever statement you want.

Did you read these before you came into my chambers?

MR. FENSTERWALD: No, sir.

THE COURT: You are unaware of the contents of these exhibits?

MR. FENSTERWALD: I am aware of the contents, but because of their length I did not read them

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FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

before I came in, and Mr. Ullman had not received them before.

THE COURT: Well, why didn't you read them before you came in? I called you in here in order to have you read them before you came in.

MR. FENSTERWALD: Your Honor, I think that one document is 46 single-spaced pages, and if you would like we certainly will read them before proceeding.

THE COURT: Mr. Ullman, did you read these exhibits?

MR. ULLMAN: Well, while waiting outside, your Honor, I read the letter. As I think Mr. Fensterwald indicated to you, we are local counsel on the matter. I did not read the 46-page document; I perused it quickly.

I think I understood Mr. Fensterwald to say that he was generally familiar with the subject matter and content. That is as much as I can tell your Honor.

THE COURT: Mr. Fensterwald, what is the nature and extent of your familiarity with this court's exhibit 3 and the attachment?

MR. FENSTERWALD: Your Honor, I received a copy of that after it had been sent to the New York Times and to the list of people. I do not know if my

name is on the list of addressees there--I do not believe it is, but at any event, some time after it was sent to the New York Times I did receive a copy of it.

THE COURT: Your name is not on the list. If you want to inspect the list--

MR. FENSTERWALD: No, sir, I did not think it was, from memory.

THE COURT: Did you have anything to do with the composition of this letter and its attachment?

MR. FENSTERWALD: Nothing whatever.

THE COURT: Were you surprised when you received a copy of it?

MR. FENSTERWALD: Yes, your Honor, I was.

THE COURT: You did not feel that you owed the Court any duty in connection with the transmittal of this?

MR. FENSTERWALD: No, sir.

THE COURT: You have not communicated with me about this letter at any time; is that right?

MR. FENSTERWALD: Your Honor, I filed a further pleading in this case with the Court after that letter was received, both by you and by me, but I have not written any letter to the Court about it.

THE COURT: Well, you have never communi-

cated with me by pleading, brief, memorandum, letter or otherwise in connection with Court's exhibits 1, 2 and 3 which I have in my hand.

MR. FENSTERWALD: No, sir.

THE COURT: Mr. Fensterwald, I regard this communication as a scurrilous, libelous communication.

I would like to have your opinion as to whether you agree.

MR. ULLMAN: Your Honor, might I comment on your question to Mr. Fensterwald respectfuily, sir?

THE COURT: Yes.

That is why I called you here.

MR. ULLMAN: We were not even aware, and I don't think Mr. Fensterwald was, nor I, what the purpose of the meeting or conference was, although when your clerk presented Mr. Fensterwald with those papers it was very easy to figure out what it was; but I wonder, your Honor, a question of that sort posed to an attorney when he is before the Court representing his client--I think it puts him in a very, very difficult position.

THE COURT: All right, you can choose not to answer it if you do not want to.

MR. ULLMAN: I do not propose to answer for Mr. Fensterwald.

THE COURT: I know, but you are suggesting that he shouldn't answer it, and if Mr. Fensterwald chooses not to answer it I will accept his decision.

MR. FENSTERWALD: Your Honor, I will attempt to answer it carefully, because this is a serious matter, and your Honor is certainly taking it so.

I think as to whether this document is libelous or not involves very serious questions of fact which I have no way of resolving.

The question of whether it is scurrilous or not, I would say it is not, in my opinion.

I might add, your Honor, that I have counselled Mr. Wolfson against any public statements of any kind outside of the Court's pleading.

He asked me once a document is entered as a formal document of the Court whether he might then distribute it, and I said I certainly thought he had every right to do so, but aside from that he would do well not to make any public comment. He has obviously seen fit not to follow my advice in this matter, and he did not send me a copy of this before he sent it out.

THE COURT: He sent it to you after.

MR. FENSTERWALD: Yes, sir.

THE COURT: So you took no action with

respect to the Court.

MR. FENSTERWALD: No, sir.

THE COURT: And this has a postmark dated Jacksonville, January 14, 1976, and I received it shortly thereafter.

I ask you whether you can fix the approximate time when you received a copy of this communication.

MR. FENSTERWALD: I cannot, sir. I asked the clerk whether I should bring any particular materials with me and he said "No".

I have the general pleadings in this case but these of course do not come within that.

THE COURT: Is it fair to say that it is more than two or three weeks ago?

MR. FENSTERWALD: I think it would be fair to say, your Honor, from my memory that it certainly was during the month of January.

THE COURT: That seems sufficiently clear.

MR. FENSTERWALD: I am trying to be as careful as I can, your Honor--obviously.

THE COURT: I regard this communication as offensive, scurrilous, libelous and grossly improper.

I direct you to advise your client to refrain from sending any further communications to me of

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any kind or about me as long as the matter which is now pending before me is sub judice.

I think I am entitled to deal only with you, his formally appointed attorney.

I think I am entitled to regard you as his exclusive spokesman, and I should not be subjected to communications coming directly from him or to communications coming to me indirectly by his communicating about me with other persons.

Now I intend, and I am advising you formally with respect to the matter that is now sub judice to place these in a sealed envelope and to make them a part of the proceedings before me as a communication received while these proceedings are sub judice, which, while they have no relevance to the issues before me, nevertheless have some relevance with respect to your client's intentions, motivations and actions, and I will make this available in the event that this matter should ever come before the Court of Appeals, as a sealed document for them to deal with in any manner that they see fit as part of these proceedings.

I also direct you--I do not think you are a member of the Bar of this Court--are you?

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MR. FENSTERWALD: No, sir.

THE COURT: Then I willdirect both of you-- my direction to you unfortunately has less authority than my direction to Mr. Ullman, but I direct both of you that in the event you come into possession of or knowledge of any communications from Louis E. Wolfson of a similar nature, as long as this matter is sub judice before me, I shall expect you to advise me forthwith thereof.

All right, thank you, gentlemen.

MR. FENSTERWALD: May I make one request, your Honor? That since this record is reasonably short, that I be permitted to wait until I get a copy of the record before communication this to Mr. Wolfson, so that he will see exactly what your Honor set forth.

THE COURT: Yes.

THE REPORTER: You will have it some time --- tomorrow morning.

MR. FENSTERWALD: And I will forward a copy to him at that time.

THE COURT: Thank you, gentlemen. I am sorry to have disturbed you for this but I felt it was necessary.

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(Recess)

THE COURT: Gentlemen, you have requested that the hearing be resumed after I terminated it, and you waited until another hearing was finished so we could resume this matter. It is now approximately an hour since we terminated the other hearing. What is it that you want to say?

MR. ULLMAN: I thank you, your Honor, and I do apologize for not reacting more quickly. But there is one problem or point at least that I want to bring to your Honor's attention with respect to your direction to counsel.

Your Honor, this has nothing whatsoever to do with countenancing the kind of material which came into your possession. As Mr. Fensterwald indicated to you, he would counsel against it. As an attorney --

THE COURT: Against what?

MR. ULLMAN: Against those kind of communications. As an attorney, your Honor, I am opposed to parties communicating with the Court, no matter what the subject of the communication is. That is why they have attorneys. I also disapprove of publicizing matters while they are in the course of litigation. That is not the point I wish to raise with your Honor at all. Also I have no trouble with your Honor's direction that Mr. Wolfson be advised to refrain from this kind of communication with the Court.

I am a little more troubled with the second part of your direction to counsel to advise your Honor of any similar matter if it comes into the possession of counsel. The only reason I am troubled by it is this, your Honor: In effect it is a direction to counsel to turn his client in to the Court for doing something which the Court has indicated, to put it mildly, I suppose, it disapproves of. In other words, your Honor, counsel is being directed to turn in his client. That is the only thing that does trouble me.

In other words, if something came into the possession of an attorney while he is representing his client, to then have to turn it over to the Court and say, "Judge, here is my client, he did something I know you don't want him to do, and I am turning him over to you," I think is a very difficult kind of a position to be in as an attorney.

I raise it with you only in that context, and I would wonder if your Honor might want to reconsider it from that point of view.

THE COURT: I am perfectly willing to leave it to your own good judgment. What I have in mind is this: The relationship between the Court and an attorney practicing before it, particularly with respect to a matter which is

sub judice, is a very delicate relationship, fraught with all kinds of problems of protocol and formality of every kind, procedurally and substantively.

I am frankly shocked to think that in the midst of a matter which is being submitted to the Court on the basis of law and facts, to be appropriately argued and briefed, the client should be free to overwhelm his counsel, say what he pleases to the Judge or to whomever else he pleases without restraint, about a case that is pending before the Judge.

To the extent that he sends these communications to persons other than the Judge himself about the case and about the Judge, of course that is one step removed from displacing his attorney as his representative and communicating with the Court over the attorney's head. I agree that it presents a slightly more delicate and difficult problem.

On the other hand, depending upon the nature of the communication and the person to whom he writes, and the nature of what he says with respect to the pending litigation, it may have some relevance to the Court's function in that case. I can't tell. It is hard for me to anticipate what your client may be planning to do in the future.

MR. ULLMAN: I think your Honor may have hit the nail on the head as to the problem that I was concerned with,

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that we don't know what our client may intend to do in the future either. And you have indicated your disapproval of what he has done. It is one thing to tell the client that the Court has directed us to tell you to refrain; it is another thing that if something comes into our possession, to turn over the client to the Court.

THE COURT: If that is your construction of my remark, and if you ever get to the point where you feel that you are being asked to become an informer on your client, I relieve you of that responsibility.

I just want to call your attention to one statement that he makes in this letter addressed to the Editor of The New York Times, of which he sent me a copy -- I am referring to Court's Exhibit 2 -- in which he says about me and two other lawyers that he was railroaded although I knew full well he was innocent.

I can hardly conceive of a more offensive remark to be made by any responsible person than that a judge railroaded an innocent man, knowing full well that that is what he was doing. I can only attribute this to your client on the basis of his resentment over his conviction for a felony.

I cannot help the fact that he has turned me into his personal enemy for reasons I don't understand, since I am

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not responsible for his associations or the facts which gave rise to his indictment or the facts which were adduced in evidence against him. Those were matters which came before me in the normal course of my functions as judge and for which I had no responsibility whatever.

But I particularly want to draw your attention to the fact that he says here: "I can now fully document this a[illegible] will give them" -- including me -- "an opportunity to sue me if I cannot prove these charges. I do not have immunity, and I am financially responsible in making these serious charges."

Gentlemen, all I wish to say -- and I will say no more -- is that I think it would be wise if you discussed this letter fully with him and advised him of what his rights really are and whether he is correct in making these statements.

MR. ULLMAN: Thank you very much, your Honor, and thank you for your response to the question raised.

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Law Offices
FENSTERWALD AND OHLHAUSEN
910 Sixteenth Street, N.W. Washington, D.C. 20006
Telephone 202 223-1667

Bernard Fensterwald, Jr.
William G. Ohlhausen

Gordon F. Harrison
Of Counsel

March 8, 1976

Hon. Edmund Palmieri
U.S. District Court
for the Southern District of New York
U.S. Courthouse
Foley Square, New York, N.Y. 10007

Dear Judge Palmieri:

In accordance with the Court's direction, counsel has communicated to Mr. Louis E. Wolfson the Court's instructions to him as well as sent him a transcript of the February 19 meeting in Chambers. Counsel has again stated forcefully to his client that he opposes any further such out-of-court statements.

Counsel wishes to take this opportunity to renew his plea that the Court either recuse itself or deny the Motion for a Writ of Error in order that petitioner may appeal the recusal issue to the Court of Appeals.

Respectfully yours,

Bernard Fensterwald, Jr.

BF:crr

cc: Mr. Louis E. Wolfson
Mr. Robert Ullman
Mr. Angus MacBeth

New York Associates • Bass & Ullman • 757 Third Ave., New York, N.Y. 10017 • 212 751-2434
San Francisco Associate • Jordan P. Ross • 368 Roosevelt Way, San Francisco, California 94114 • 415 863-8477

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
NEW YORK, N. Y. 10007

CHAMBERS OF
EDMUND L. PALMIERI
DISTRICT JUDGE

March 22, 1976

Bernard Fensterwald, Jr., Esq.
Fensterwald and Ohlhausen
910 Sixteenth Street, N.W.
Washington, D. C. 20006

Robert Ullman, Esq.
Bass & Ullman
747 Third Avenue
New York, N. Y. 10017

Angus C. Macbeth, Esq.
Assistant United States Attorney
One St. Andrew's Plaza
New York, N. Y. 10007

Re: United States v. Wolfson, 66 Cr. 720

Dear Sirs:

On February 9, 1976, this Court issued an order in the above captioned matter which reiterated portions of earlier directions to petitioner's attorney. The order specifically required that petitioner's attorney file with the Court affidavits which, among other things (1) specify which of the two cases, the Continental case (66 Cr. 720) or the Merritt-Chapman and Scott case (66 Cr. 832), each of the points he raises is based on, (2) state that a conscientious study has been made of all relevant documents referred to in the petition that are available, and (3) specify (a) which such documents are not available, (b) why they are unavailable, and (c) which unavailable documents are listed on the court clerk's docket sheet as part of the official record. The purpose of this directive was to clear this petition of collateral and irrelevant issues and to keep this matter within appropriate and manageable compass.

Petitioner's attorney has sent this Court a letter dated March 8, 1976, attached hereto, which is construed

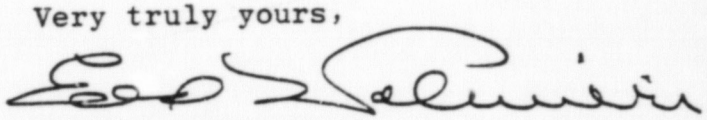
2/23/76

to be an expression of his intent not to comply with the Court's direction regarding the manner in which this case should be submitted.

In view of this non-compliance on the part of petitioner's counsel, this Court is constrained to dispose of the matter on the merits notwithstanding its unhappy posture. Therefore, the United States Attorney is hereby requested to make whatever reply he deems appropriate under the circumstances within four weeks so that the Court can proceed to a disposition of this matter.

This letter will be entered in the official records of the Court and should be construed as an order of the Court.

Very truly yours,



Edmund L. Palmieri
U. S. D. J.

CC: LEW
MCT
CW

Law Offices
FENSTERWALD AND OHLHAUSEN
910 Seventh Street, N.W. Washington, D.C. 20006
Telephone 202 223-1667

File Copy

EXHIBIT A

Bernard Fensterwald, Jr.
William G. Ohlhausen
Gordon F. Harrison
Of Counsel

April 8, 1975

Judge Edmund Palmieri
United States District Court
Foley Square
New York, New York

Dear Judge Palmieri:

As it seems clear from the Court's letter of March 22nd that Mr. Wolfson's petition will have to be reviewed by the Court of Appeals before any adequate consideration on the merits will be given to it in the District Court, we wish the record to be as clear as possible before it leaves the District Court; hence, this letter.

As the lead counsel for petitioner Wolfson practices in Washington, D.C., he is more attuned to adversary pleadings with the opposing party and to hearings in open court than to jousting with the Court in letters and affidavits and in-chambers, ex-parte proceedings. However, he is content to conform to the Court's preference, but he asks that this lecter be entered in the official records of the Court and construed as a formal pleading.

It might be helpful to recall summarily the history of this proceeding which has dragged on for almost a year without the Court even requiring that a reply be filed by the respondent. The original petition for a writ of error, which was filed on May 16, 1975, was addressed to Chief Judge Edelstein. It asked that the petition be assigned at random to any judge in the Court other than Judge Palmieri; it was stated that petitioner anticipated calling Judge Palmieri as a witness. Judge Edelstein denied the request, and the petition was sent to Judge Palmieri. On June 18, 1975, petitioner filed a Motion for Recusal of Judge Palmieri, with supporting Memorandum of Fact and Law. On July 23rd, the Court ordered this Motion dismissed. By letter dated July 24th, the Court "requested" that the attorneys for plaintiff file a complex affidavit with res-

New York Associates • Bass & Ullman • 747 Third Ave., New York, N.Y. 10017 • 212 751-9323
San Francisco Associate • Jordan P. Ross • 308 Roosevelt Way, San Francisco, California 94114 • 415 863-

pect to their preparation of the petition and their familiarity with all of the relevant documents in both the Continental and Merritt cases. In August, petitioner moved that the Court reconsider its denial of the motion to recuse. In an Order, dated September 16th, the Court reaffirmed its decision of July 23rd, refusing to recuse; the Court added that petitioner's Counsel had 60 days in which to file the required affidavit or "the Court intends to dismiss the petition." The 60 days having long passed, the Court has neither recused itself, required the respondent to reply to the petition, nor dismissed the petition.

The reason that petitioner's counsel has not filed a "satisfactory" affidavit .... though he did file an apparently "unsatisfactory" one .... is that affidavits must be made under oath, and counsel cannot possibly swear to things of which he has no knowledge. As late as March 22, 1976, the Court is requiring that petitioner's counsel answer under oath why certain documents are "unavailable" in the Court's own records. It is impossible for counsel to answer such question, under oath or otherwise. Counsel has respectfully pointed out to the Court that large parts of the records in both the Continental and Merritt cases are missing from the Court's files, which were in the possession of the United States Attorney when available for examination. Possibly the United States Attorney or the Court's Clerk can inform the Court why the files in these cases are in such a state of shambles; petitioner's attorney cannot. Petitioner also wishes to point out that the Court refuses to unseal those parts of the records sealed in 1967-1968.

Further, the "satisfactory" affidavit which is demanded would have to contain certain conclusions of law, which are not ordinarily put into affidavit form. On November 7, 1975, counsel filed a detailed affidavit answering as many of the Court's factual questions as possible and pointing out why certain other questions could not be answered by him.

It should be noted that the Court not only has pointedly failed to require a similar affidavit of the respondent in this case, it has not even required that respondent answer the petition. In petitioner's view, this is one more example of bias and prejudice on the part of the Court, and another reason why the Court should recuse itself. As the revised 28 U.S.C. 455 states, a judge "shall disqualify himself in any proceedings in which his impartiality might reasonably be questioned." We believe that such impartiality is clearly lacking in this proceeding.

The Court in the letter of March 22, 1975, states that the purpose of requiring the affidavit from petitioner's counsel is to "clear this petition of collateral and irrelevant issues and to keep this matter within appropriate and manageable compass." In petitioner's view, this purpose would be most easily and properly fulfilled by requiring the U.S.Attorney to answer the petition on its merits.

The Court points out that the petitioner's counsel appears not to wish "to comply with the Court's direction regarding the manner in which this case should be submitted." Counsel has done the best he can in regard to the matter of the affidavit, but he wishes to emphasize that both he and petitioner from the outset have urged that the manner of proceeding should be determined by any Judge of the Court other than Judge Palmieri. In our most conscientiously held view, it is more a matter of "who" than "how". Thus the repeated motions of recusal.

On one point, we would agree with the Court. In the last sentence of its letter of March 22, 1976, the Court describes the posture of the case as "unhappy". We would agree. Going back over a period of eight years now, petitioner has been attempting to get any judge other than Judge Palmieri, whom he claims is biased against him, to examine the constitutional issues he has raised in connection with his conviction in the Continental case. Despite a recent radical statutory change in 28 U.S.C. 455, he has been unsuccessful to this point.

In view of the admittedly "unhappy posture" of this complicated case, petitioner takes the liberty of suggesting to the Court that, applying the provisions of 28 U.S.C. 1292(b), it should stay proceedings in this matter until an interlocutory appeal can be filed on the issue of recusal. Petitioner believes that the order denying petitioner's motion for recusal "involves a controlling question of law as to which there is substantial ground for differences of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

Respectfully yours,

Bernard Fensterwald Jr.

BERNARD FENSTERWALD, JR.
Attorney for Louis E. Wolfson

BF:fs
cc: Mr. Angus McBeth
Mr. Robert Ullman
Mr. Louis E. Wolfson

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK
NEW YORK, N. Y. 10007

EXHIBIT A

CHAMBERS OF
EDMUND L. PALMIERI
DISTRICT JUDGE

April 14, 1976

Bernard Fensterwald, Jr., Esq.
Fensterwald and Ohlhausen
910 Sixteenth Street, N. W.
Washington, D. C. 20006

Re: United States v. Wolfson
66 Cr. 720 (ELP)

Dear Sir:

Judge Palmieri has asked me to reply to your letter of April 8, 1976, and to say that if it is your intention to move for an order permitting an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), you must do so in compliance with the local rules of this court. The submission should be made by local counsel, and time for a response by the United States Attorney should be allowed. Accordingly, Judge Palmieri asks me to advise you that he declines to enter your letter in the official records of the court or to construe it as a formal pleading.

A statement on the third page of your letter to the effect that the United States Attorney should be required "to answer the petition on its merits" appears to have overlooked the outstanding directions of the Court. A directive to this effect is contained in the penultimate paragraph of the Court's letter of March 22, 1976, addressed to counsel and which explicitly states it is to be construed as an order of the Court.

Judge Palmieri is presently awaiting receipt of the United States Attorney's response to the Coram Nobis petition, and he will rule on it thereafter and in due course notwithstanding the reservations expressed in his letter of March 22, 1976, regarding your failure to comply with the Court's order of February 9, 1976.

Very truly yours,

Joseph W. Schmidt

Joseph W. Schmidt
Law Clerk

cc: Robert Ullman, Esq.
747 Third Avenue
New York, N. Y. 10017

Angus C. Macbeth, Esq.
Assistant U. S. Attorney
One St. Andrew's Plaza
New York, N. Y. 10007

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	)	66 CR. 720
	)	
	)	
v.	)	AFFIDAVIT
	)	
	)	
LOUIS E. WOLFSON	)	

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Paul R. Grand, being duly sworn, deposes and says:

1. I am a member of the firm Poletti Freidin Prashker Feldman & Gartner and have been since February 1969. Between February 1961 and February 1969, I was an Assistant United States Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York.

2. On April 9, 1976, Assistant United States Attorney Angus MacBeth furnished me with copies of pages 50 and 51 of a Petition for Writ of Error Coram Nobis on behalf of Louis Wolfson and a two page affidavit of Elkin Gerbert dated August 29, 1974 (attached hereto as Exhibits "A" and "B" respectively) and requested that I submit an affidavit in response thereto. I do so in the following paragraphs.

3. The first page of Exhibit "A" hereto erroneously states that I was "one of the prosecutors in the Continental case," the conviction in which Mr. Wolfson now seeks to set aside. The chief prosecutor in that case was Michael F. Armstrong; he was assisted by Charles Sifton. Mr. Armstrong presented both the Continental and Merritt-Chapman cases to the Grand Jury with no assistance from or participation by me. Nor did I participate in the trial or appeal in the Continental case.

4. I became the chief trial counsel for the Government in the Merritt-Chapman case in approximately February 1966 because Mr. Armstrong, who was in charge of that case, then resigned from the United States Attorney's Office to return to private practise and because I was the next most senior member of the Securities Fraud Unit. In short, my first substantive involvement in either case in which Mr. Wolfson was a defendant commenced in approximately February 1968, approximately 1-1/2 years after Mr. Wolfson's indictment in both cases.

5. The Merritt-Chapman case was tried between June and August 1968. In October 1968, approximately one year after his conviction in the Continental case, Mr. Wolfson moved for a new trial and I represented the Government at the hearing on that motion.

6. While it is true that my father was at one time one of several directors of Scullin Steel Company in St. Louis, Missouri, control of which was, according to Mr. Gerbert's

affidavit (Exhibit "B"), purchased by a group including Mr. Gerbert and Louis Wolfson, my knowledge of the business relationship between Mr. Gerbert and my father has always been almost non-existent. According to Mr. Gerbert, he became a director of Scullin Steel Company in 1955 and my father resigned two years later in 1957 (see ¶¶ 1, 4 and 5 of Exhibit "B").

7. I was graduated from college in June 1955, was drafted into the United States Army in September of that year and was stationed at Fort Dix, New Jersey, and Uijongbu, South Korea, until the late summer of 1957 when I came to New York to begin Columbia Law School. Throughout these years, my parents lived in St. Louis, Missouri. As is apparent from my physical separation from my father during these years, I would have had little if any occasion to discuss with him matters relating to his role as a director of Scullin Steel Company. In any event, I have no recollection of discussing whatever business relationship existed between Mr. Gerbert and my father. Nor do I recall knowing whether my father ever met or had any direct dealings with Louis Wolfson. Indeed, I believe my knowledge of my father's role as a director of Scullin Steel Company was limited to what I read in a single newspaper article published in the St. Louis Post Dispatch or Globe Democrat at the time of his resignation as a director.

8. My recollection of my conversation with Mr. Gilbert during the trial of the Merritt-Chapman case differs from Mr. Gerbert's. I recall his asking me if I came from St. Louis and whether my father was Joseph Grand. I answered "yes" to both questions. He then said to me "Your daddy used to work for us," to which I responded simply "that's not my understanding." To the best of my recollection, there was no more to the conversation. Mr. Gerbert is correct that none of the many defense counsel made a motion at any time to disqualify me as counsel for the Government. Nor in my judgment would there have been any basis for such a motion.

Paul R. Grand

Paul R. Grand

Sworn to before me this
19th day of April, 1976.

Kathryn J. Rodgers

KATHRYN J. RODGERS
Notary Public, State of New York
No. 31-4516260
Qualified in New York County
Commission Expires March 30, [illegible]

EXHIBIT [illegible]

AFFIDAVIT

I, Elkin Gerbert, being duly sworn, do state the following to be correct to the best of my recollection:

1) In 1955, I was elected to the Board of Directors of Scullin Steel Company in St. Louis, Missouri. At that time, also serving on the Board was Joseph H. Grand of the law firm of Jones, Hocker, Gladney and Grand.

2) Our group, which consisted of Alexander Rittmaster, Louis E. Wolfson, Samuel W. Wolfson, Cecil Wolfson, and six other individuals, bought control of Scullin Steel Company. Alexander Rittmaster and I were elected to the Board of Directors to represent the controlling stock interest in Scullin Steel Company.

3) Mr. Joseph H. Grand, with E.F. Judge, Emmett T. Carter, Thomas W. Pettus, W.H. Bixby, and William S. Titus, continued to stay on the Board of Directors. Mr. Grand and Mr. Titus had very little stock interest but they represented Wertheim and Company, who were stockholders in Scullin Steel Company.

4) During the next two years Mr. Joseph H. Grand continued to stay on the Board of Directors. I had continuous disagreements with Mr. Grand as I was the spokesman for the new control group. Mr. Grand was the spokesman for the old management. Every time a significant change was made, there was always an argument between Mr. Grand and myself as he did not want to change the Company. He just wanted to let the Company move along as it had done in the past.

5) There came a time when Universal Marion Corporation made an offer to all the stockholders of Scullin Steel Company for an exchange of their Scullin Steel stock for stock of Universal Marion Corporation. Mr. Grand became adamant in not wanting to

Exhibit "B"

EXHIBIT VIII(A) P..

make this exchange. We had a very heated argument and I eventually had to force his removal from the Board, with much bitterness all around.

6) During the Merritt-Chapman & Scott Case, in which I was a defendant, I had occasion during a recess to engage in conversation with one of the prosecutors, Mr. Paul Grand.

7) When I casually inquired of Mr. Grand as to his home town, he replied, "St. Louis".

8) I then asked him, perchance, whether he were related to a Joseph Grand. He replied to the effect, "Yes, he is my father."

9) When I asked him if he knew of the running feud I had had with his father, he replied in the affirmative.

10) When I asked him whether he should not remove himself from the case because of a conflict of interest, he only smiled.

11) I reported the conversation to one of the defense attorneys, but I do not believe that any formal motion was made to the Court to seek Mr. Grand's disqualification.

12) Mr. Grand continued in his role as prosecutor.

Affiant sayeth no more.

Elkin Gerbert
ELKIN GERBERT

DATED: 8/29/74

Notary

Notary Public, State of Florida at Large
My commission expires Aug. 10, 1975

ROBERT M. MORGENTHAU, being duly sworn, deposes and says:

1. I make this affidavit at the request of the United States Attorney for the Southern District of New York.

2. I was the United States Attorney for the Southern District of New York in 1966 at the time that a grand jury in that District returned the indictment in this case against Louis E. Wolfson.

3. I never personally appeared before that grand jury in relation to this case or any matter related to Louis E. Wolfson.

4. The foreman of the grand jury which indicted Louis E. Wolfson was William McRitchie. McRitchie was employed by the Morgan Guaranty Trust Company, and served, I believe, as head of the Personal Trust Department. My father, Henry Morgenthau, Jr. conducted various of his affairs through the Morgan Guaranty Trust Company, and following his death in 1967 Morgan Guaranty Trust Company, my father's widow and I were named executors of his estate.

5. Prior to McRitchie's serving as foreman of the grand jury I had met him two or three times at the bank with my father, and following my father's death I talked with McRitchie several times

on matters involving my father's estate. This was a business relationship, and I was not a personal or social friend of McRitchie.

6. Beyond telling Assistant United States Attorney Michael Armstrong that I thought it was proper for McRitchie to serve on the grand jury, I had no conversation with or about McRitchie concerning any grand jury matter.

Sworn to before me this
21st day of May, 1976.

RUBIN G. SCHINDLOFF
Notary Public, State of New York
No. 03-8918225
Qualified in Bronx County
Certificate Filed in New York County
Commission Expires March 30, 1978

A F F I D A V I T

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MICHAEL F. ARMSTRONG, being duly sworn, deposes and says:

1. I am an attorney and member of the firm of Barrett Smith Schapiro & Simon, 26 Broadway, New York, New York 10004.

2. From September 1962 through December 1967 I was an Assistant United States Attorney in the Southern District of New York.

3. During that time I was the attorney in charge of the grand jury presentation and trial in the criminal case naming Louis Wolfson and Elkan Gerbert as defendants.

4. I have been asked to recount my association with William McRitchie, the foreman of the grand jury which returned the indictment against Mr. Wolfson and Mr. Gerbert. Mr. McRitchie's son was a classmate of mine during the last few years in grade school and through high school. We graduated from high school in 1950. We were close friends during some portion of grade school -- to the best of my recollection, fourth or fifth grades. Subsequent to that time, throughout the rest of our mutual school experience, I saw less of him and we grew to have different circles of friends.

5. During the period of time when I was in school with Mr. McRitchie's son, I occasionally came in contact with

Mr. McRitchie. Almost all of my contacts were during grade school and all of them were in passing. I have no specific recollection of any conversations with Mr. McRitchie during this period of time and my recollections of him are largely reconstructed. It is entirely possible that I saw very little of him since my contacts with his son would have been during the day when I assume Mr. McRitchie must have been at work.

6. From 1950 until the time of the convening of the grand jury, of which Mr. McRitchie was a foreman, I have a vague recollection of seeing him briefly on, at most, two or three occasions. I have no idea of the dates of these occasions, if indeed they occurred.

Michael F. Armstrong
MICHAEL F. ARMSTRONG

Sworn to before me this
21st day of May, 1976.

Joan Farrell

JOAN FARRELL
Notary Public, State of New York
No. 02-4621630
Qualified in Bronx County
Certificate Filed in New York County
Commission Expires March 30, 19[illegible]

AM:bmj
M-1615

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA :

- v - : AFFIDAVIT

LOUIS E. WOLFSON, : 66 Cr. 720 (ELP)

Defendant. :

- - - - - - - - - - - - - - - - - - - -x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

WILLIAM A. McRITCHIE, being duly sworn, deposes and says:

1. I was the foreman of the Grand Jury which indicted Louis E. Wolfson in this case.

2. Michael Armstrong, the Assistant United States Attorney in charge of presenting this case to the Grand Jury, grew up in Bronxville, New York and attended the same school as my son, William A. McRitchie, Jr. with whom he was on friendly and familiar terms.

3. My son graduated from high school in approximately 1950. Before that date I had seen Armstrong from time to time as a friend of my son's. After that date I saw Armstrong at most three or four time before sitting on the grand jury. These meetings after 1950 were all of the most brief and casual social nature. It is inaccurate to describe Armstrong as "a life-long and intimate friend" of mine.

AM:bmj
M-1615

4. I knew Robert M. Morgenthau only on a business basis. Morgenthau's father, Henry Morgenthau, Jr., had affairs which were conducted through the Morgan Guaranty Trust Co. of New York and the Morgan Guaranty, with Robert M. Morgenthau, and Mrs. Henry Morgenthau, Jr. was executor of Henry Morgenthau, Jr.'s estate. I was employed from 1928 to 1968 in the trust department of the Morgan Guaranty and was Vice President and Senior Trust Officer in charge of the personal trust department at the time of my retirement in 1968. Following Henry Morgenthau, Jr.'s death in 1967, Robert Morgenthau conducted various matters of business in relation to the estate with me. Although I met Robert M. Morgenthau through his father a few times in social settings, my relationship with him was a business one rather than one of personal friendship.

5. At no time during the deliberations of the Grand Jury did I act in any manner which I believe to be other than fair and impartial. I do not believe that I was in any way influenced by my knowledge of Armstrong or Morgenthau.

6. On or about November 9, 1970, I had a conversation with one Richard Townley (my notes also show the name spelled "Tannley" and "Tannerly") having to do with my service on the Grand Jury which indicted Louis E. Wolfson. On July 2, 1974, Ken Smith, an investigator with the law firm of Fensterwald and Ohlhausen, visted me to ask for an affidavit which I refused to give him.

AM:bmj
M-1615

In the course of that conversation he revealed to me that Townley, unknown to me, had made a tape recording of our conversation and was in fact connected to Louis E. Wolfson. I attach hereto a copy of a letter which Bernard Fensterwald, Jr. wrote me on this matter. If Wolfson is still in possession of the tape recording, I believe it will substantiate the facts as I have set them out here.

WILLIAM A. McINTCHIE

Sworn to before me this
21st day of May, 1976

MARIA A. MORALES
NOTARY PUBLIC, State of New York
No. 31 - 4521851
Qualified in New York County
Term Expires March 30, 1976

ACM:cr

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA :

-v- :

LOUIS E. WOLFSON, : AFFIDAVIT

Defendant : 66 Cr 720 (ELP)

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss:
SOUTHERN DISTRICT OF NEW YORK)

ANGUS MACBETH, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Robert B. Fiske, Jr, United States Attorney for the Southern District of New York and have been assigned responsibility for the above-captioned case.

2. On May 28, 1976 I examined the grand jury record book for the August 9, 1966 Special Grand Jury in relation to the voting of the true bill in this case.

3. The record book showed that the true bill in this case was voted on September 19, 1966 and that on that day 19 grand jurors were present and that 19 grand jurors voted in favor of the true bill

Angus Macbeth

ANGUS C. MACBETH
Assistant United States Attorney

Sworn to before me
this 1st day of June 1976

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA

-against-

LOUIS E. WOLFSON and
ELKIN B. GERBERT,

Defendants.

----------X

NOTICE OF MOTION

66 Cr. 720

S I R :

PLEASE TAKE NOTICE, that upon the indictment herein and the annexed affidavit of MILTON S. GOULD, sworn to the 7th day of April, 1967, and the exhibits annexed thereto, and upon all of the proceedings heretofore had herein, the undersigned will move this Court at the Criminal Motion Part, Room 318, United States Courthouse, Foley Square, New York, New York, on the 17th day of April, 1967, at 10:30 o'clock in the forenoon thereof, or as soon thereafter as counsel can be heard, for an order pursuant to Rules 6(b) and 12(b) of the Federal Rules of Criminal Procedure, dismissing the indictment herein or, in the alternative for a hearing on this motion on the following grounds:

1. The Grand Jury which handed down this indictment was selected, drawn and summoned in violation of the Fifth Amendment to the United States Constitution and Title 28 U.S.C., Sections 1861, 1862, 1863, 1864, and 1865, in that it does not constitute a fair and representative cross-section of the community from which it is purportedly drawn, namely, the Southern District of New York, and

2. The Grand Jury which handed down this indictment did not constitute a fair cross-section of the community from which it was purportedly drawn, namely the Southern District of New York, and hence was in violation of the Fifth Amendment to the United States Constitution and Title 28 U.S.C., Sections 1861, 1862, 1863, 1864 and 1865, in that it was selected, drawn and summoned by a method which resulted in the systematic exclusion of representative numbers of Negroes, Pureto Ricans and members of the lower-income, socio-economic segments of the said community.

Dated: New York, New York
April 7, 1967

Yours, etc.,

SHEA GALLOP CLIMENKO & GOULD

By _____
Member of the Firm
Attorneys for Defendant Wolfson and
Co-Counsel for Defendant Gerbert
330 Madison Avenue
New York, New York 10017
MO 1-3200

-and-

ARNOLD & PORTER
Co-Counsel for Defendant Gerbert
1229 19th Street, N.W.
Washington, D.C. 20036

TO:

ROBERT M. MORGENTHAU, ESQ.
United States Attorney for the
Southern District of New York
United States Court House
Foley Square
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA

-against-

LOUIS E. WOLFSON and
ELKIN B. GERBERT,

Defendants.

AFFIDAVIT

66 Cr. 720

----------X

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

MILTON S. GOULD, being duly sworn, deposes and says:

1. I am a member of the firm of Shea Gallop Climenko & Gould, attorneys for defendant Wolfson and co-counsel for defendant Gerbert herein. I submit this affidavit in support of defendants' motion to dismiss the indictment on the ground that the system for selecting grand juries in this District consistently violates, and in the case of the grand jury which returned this indictment, did violate the Constitution and applicable statutes of the United States.

2. I respectfully suggest that the issues here raised, and the facts presented herewith, are at the very least substantial enough to require a full hearing on this motion, should the Court not see fit to order dismissal in the first instance.

3. I ask the Court to consider this motion at this time, because the fast-developing law regarding the composition

of grand juries has produced a number of very recent cases which shed new light on the problems in the area. Among them are Whitus v. Georgia, ___ U.S. ___, 35 LW 4176 (January 23, 1967), Vanleeward v. Rutledge, 369 F.2d 584 (5 Cir., December 6, 1966), and Chestnut v. People of State of New York, 370 F.2d 1 (2 Cir., December 2, 1966).

4. Attached hereto as Exhibit 1 is a copy of the grand jury venire from which was selected the grand jury in this case.

5. Attached hereto as Exhibit 2 is a copy of the list of the grand jurors who handed up this indictment.

6. Attached hereto as Exhibit 3 is a copy of the affidavit of William M. Kunstler, sworn to December 27, 1966, which was submitted in support of a motion similar to this one in United States v. Naphtali, S.D.N.Y., 66 Cr. 732.

7. It will be seen that the great majority of veniremen listed in Exhibit 1 had such occupations as "executive," "investment banker," "account executive," "architect," "advertising executive," "executive vice president," "general manager," "stock specialist," "statistician," "art director," "editor," "banking," "vice president," "president," "public relations," "treasurer," "account auditor," "engineer," "administrator," "buyer" and "consultant." There were also a number of "housewives" and "retired" persons. There was one "receptionist." There was one person engaged in "maintenance." There were three "secretaries."

8. Of the grand jurors selected in this case, there were two "vice presidents," one "executive vice president," one "executive," one man who listed "investments," one "stock specialist," one "exporter," one "real estate agent," one "editorial assistant," one "art director," one "partner," one "accountant," one "bookkeeper," five "housewives," and three who gave no occupation.

9. Almost all the veniremen from Westchester County came from the traditionally wealthy towns of Scarsdale, Rye, White Plains, Hartsdale, New Rochelle, and Mt. Kisco. Of the 85 veniremen from New York County, there were 25 who lived on the upper east side, 8 who lived on Fifth Avenue, 9 who lived on Park Avenue, 4 who lived on Sutton Place, 3 who lived on Central Park West, 2 who lived on East End Avenue, 1 who lived on Central Park South, and 1 who lived on Gracie Square. There was also 1 who lived on West 138th Street.

10. Of the grand jurors selected from Westchester County there were 2 from Scarsdale, 1 from White Plains, 1 from Rye, 1 from Bronxville, 1 from New Rochelle, and 1 from Purchase. There were 3 grand jurors from Bronx County. Among the 13 grand jurors from New York County, there were 2 who lived on Fifth Avenue, 4 who lived on the upper east side, 2 who lived on Riverside Drive, 1 who lived on Washington Square, and 1 who lived on West End Avenue.

11. On information and belief, the system for selecting grand juries in this District is as described in the attached affidavit of Mr. Kunstler, p. 2 et seq.

12. It appears that grand jury venires in this District are drawn from voter registration lists. That the voter registration lists themselves might reveal no discrimination cannot be deemed determinative of constitutional question here, in view of the make-up of the grand jury venires which have resulted from the system.

13. On information and belief, the approximately 100 consecutive grand jury venires in this District from January 3, 1961, to date have exhibited the same pattern of selection as that shown in Exhibit 1 hereto. (See Kunstler affidavit, ¶¶ 6 and 7, and Exhibits K and L.)

14. It is plain that the system used consistently results in grand jury venires and grand juries which are disproportionately lacking in the proper number of Negroes and Puerto Ricans, and persons from lower income and socio-economic strata of the community. The conclusion is borne out by the most casual inspection of the names, addresses and occupations of the veniremen listed.

15. Defendants contend that the system by which the indicting grand jury was selected was unlawful and in violation of the Constitution in that the method used results in an array which is not a fair cross-section of the community from which the grand jurors are drawn.

16. Defendants do not claim that those administering the system have necessarily acted with evil intent, nor that they have deliberately caused the system to produce grand juries which fail to meet the standards of the Constitution and applicable statutes. It is nevertheless plain that somewhere in the process for selecting grand jury venires there are discriminatory factors, steps in the procedure which are geared to permit the

use of consistently unrepresentative grand juries.

17. On information and belief, although the grand jury summons (Exhibit A to Kunstler affidavit) provides that "the penalty for failure to attend is contempt of court," no sanction has ever been sought against persons who fail to respond to the summons. This lack of enforcement would appear to be a factor causing the one-sided composition of the grand juries in this District.

18. Defendants contend, and the accompanying memorandum demonstrates, that the Jury Commissioner and jury clerks have an affirmative duty to develop and use a system of selecting grand juries which will probably result in grand juries reflecting a fair cross-section of the community. That the grand jury venires in this District over the past six years have instead reflected the very antithesis of a fair cross-section is prima facie proof that an improper system is being used.

19. I respectfully submit that, at the very least, a hearing on the issues raised by this motion is required. The testimony of the officers in charge of grand jury selection, the venires from 1961, or earlier, to date, the questionnaires and related documents upon which the grand jury lists and venires are based, must be available before any lawful disposition of the grave issues raised herein can be made.

WHEREFORE, it is respectfully prayed that this motion be granted and the indictment herein dismissed, or, in the alternative, that the issues herein be set down for a prompt hearing.

Milton S. Gould

Sworn to before me this
7th day of April, 1967.

249A

U.S. FILED COURT
JUL 7 1966
S. D. OF N. Y.

10:15 A.M.
ADDITIONAL GRAND JURY
ROOM 318
AUGUST 9, 1966
HON. JOHN M. CANNELLA

DISTRICT OF NEW YORK: SS

PANEL OF ADDITIONAL GRAND JURORS FOR a United States District Court for the Southern District of New York, to be held in the United States Court House, Foley Square, in the Borough of Manhattan, in the City of New York, on the 9th day of August 1966, at ten-fifteen o'clock in the forenoon. Drawn by the Deputy Clerk W. Schultz, and the Jury Commissioner on the 6th dayof July 1966, in conformity with the statute in such case made and provided and the order of said Court.

NAME	ADDRESS	OCCUPATION
Abramson, Jack	3521 DeKalb Ave.,Bx.,NY	Salesman
Altmark, Milton	930 Fifth Ave., NYC	Investments
Amberg, John L.	25 Hathaway La.,White Plains, NY	Exporter
Ammann, Wilbur C.	45 Sutton Place So., NY	Exec.
Bachanach, Richard S.	157 E. 81 St., NY 28, NY	Bus. & Esta
Basham, Harvey A., Jr.	261 W. 11 St., NYC	Banking
Bergin, Mrs. Joan	278 1st Ave., NYC	Housewife
Berwood, Mrs. Celia F.	2830 Grand Concourse, Bx.,NY	Housewife
Binder, Abe L.	5 Horseguard La.,Scarsdale, NY	Exec. Vice
Bogert, H. Lawrence,Jr.	791 Park Ave., NY	Invest. Ban
Bolt, Arthur	301 E. 66 St., NYC	Retired
Brad, Edward A.	82 Hampton Rd.,Scarsdale, NY	Marine Sale
Branigan, Richard L.	234 E. 52 St., NY 22, NY	Acct. Exec.
Brown, Mrs. Anna Belle	25 C.P.W., NY 23, NY	Housewife
Brown, William S.	26 Allendale Dr., Rye, NY	Architect
Butler, Mrs. Gwendolin E.	39 Robin Hill Rd.,Scarsdale, NY	Housewife
Carlson, William H.	43 Secor Rd.,Scarsdale, NY	Mfg. Rep.
Chesebrough, Frederick W.	414 Strawtown Rd.,Nyack, NY	Pharmacist
Chambers, Sidney L.	75 Avon Circle, Wh. Pls., NY	Sales
Clark, P. Bradley	1125 Park Ave. NY	Exec.
Clausen, Lawrence L.	2 5th Ave., NY 11, NY	Exec.
Cleaver, Irwin	415 E. 52 St., NY	Archi.
Cohen, Miss Fern Cohn, Henry A.	153 W. 57 St., NYC 128 C.P.S. , NYC	Comp... Dre...
Colombo, James G.	116 E. 235 St.,Bx.70, NY	Dr...

BEST COPY AVAILABLE

Coughran, Tom B.	923 Fifth Ave., NYC	Exec. Vice
Cunningham, John P.	5225 Sycamore Ave.,Bx.,NY	Advtg. Exec
Dale, John G.,Jr.	360 E. 65 St., NYC	R.E. Agent
Daglin, Theodore L.	60 Sutton Pl.So., NYC	Advtg.
Deneau, Mrs. Ruth G.	500 E. 77 St., NYC	Housewife
Detrani, Albert J.	875 West End Ave., NYC	Chemist
D'Onofrio, Nicholas P.	174 Grant Ave.,White Plains,NY	Acct.
Doonan, Raymond J.	611 Palmer Rd.,Yonkers,NY	Gen. Mgr.
Drescher, Gustave	Biltmore Dr.,Rye,NY	VIce Pres.
Epter, Lawrence A.	8 East 83 St., NYC	Exec.
Feldman, Mrs. Miriam	160 Riverside Dr., NYC	None
Feller, Mrs. A.H.	50 C.P.W., NYC	Housewife
Fenwick, Mrs. Violet M.	3015 Roberts Ave.,Bx.,NY	Housewife
Fox, Francis A.	625 E. 14 St., NYC	Sr. ~~EXXX~~ Cl.
Fraiman, Herbert	28 E. 70 St., NYC	Investor
Frankel, Jerome	135 Wykagyl Terr.,New Rochelle,NY	Stock Speci
Freydberg, Eli	140 E. 72 St., NYC	Exec.
Fromm, Robert J.	405 E. 54 St., NYC	Statistici
Gamso, Mrs. Blanche K.	175 W. 93 St, NYC	Housewife
Gersen, Mrs. Sylvia	414 E. 52 St., NYC	Editorial A
Gilmore, Samuel H.	41 W. 58 St., NYC	R.E. Invest
Goble, Mrs. Ermine S.	109 E. 88 St., NY 28, NY	Art Directo
Graef, Mrs. Gretchen W.	25 E. 86 St., NYC	Housewife
Green, Ruth	200 E. 57 St., NYC	----
Green, Sydney.	269 W. 72 St., NYC	Music Arrin

Habeeb, MitchellH.	211 E. 53 St., NYC	Adv.
Handelman, Donald E.	16 Calton La.,New Rochelle,NY	Partner
Harper, James A.	125 E. 84 St., NYC	Banking
Hawes, Stewart S.	11 Axtell Dr.,Scarsdale, NY	Invest. Ban
Hawkins, Samuel A.	68 W. 138 St., NYC	Insur. Brok
Heitmann, Claus F.	17 Taunten Rd.,Scarsdale, NY	Retired
Hersey, Irwin I.	106 W. 69 St., NYC	Editor
Hettinger, Herman S.	433 W. 21 St., NY 16, NY	President
Hickerson, John M.	18 Wayside La.,Scarsdale, NY	Advtg.
Horowitz, Mrs. Mildred S.	200 E. 66 St., NYC	Receptionist
Howe, Merrill T.	66 Keats Ave.,Hartsdale, NY	Maintenance
Hunter, Henry H.	50 Riverside Dr., NYC	Public Rela
Israels, Mrs. Ruth	5 Riverside Dr., NYC	Housewife
Jones, John J.	5532 Netherland Ave., Bx.,NY	Acct.
Katte, Edwin B.	150 E 73 St., NYC	Asst. Office
Keiser, Mrs. Beatrice A.	1010 Fifth Ave., NYC	Housewife
Kelley, Miss Esther	237 E. 20 St., NYC	Field Rep.
Kelly, Robert J.	3548 Tryon Ave.,Bx.,NY	Salary Adm.
Kelly, Vincent E.	46 Bellwood Ave.,Dobbs Ferry,NY	Foreign Sale
Kiernan, Eugene C.	2090 E. Tremont Ave.,Bx.,NY	Svce. Mgr.
Klem, Harold V.	118 E. 40 St., NYC	Vice Pres.
Koff, Murray	171 Brite Ave.,Scarsdale, NY	Advtg.
Lanusa, Mrs. Barbara	70 Marble Hill Ave., NY 63, NY	Bookkeeper
Lee, Mrs. Fay	601 E. 20 St., NYC	Unemployed
Lewis, Mrs. Annette P.	2 Peter Cooper Rd., NY	Housewife.

Linser, August H.	30 E. 68 St., NYC	Treasurer
Lipsey, Mrs. Judith	180 East End Ave., NY	Housewife
Livingston, Mrs. Henriette	530 Park Ave., NYC	Housewife
Lord, Robert	4 Mildred Ave.,Rye, NY	Sales Engr.
Lord, William G.	850 Park Ave., NY 21, NY	Exec.
Lowery, Walter W.	1506 Crotona Park E.,Bx.,NY	Acct. Audi
Ludlow, Howard C.	3310 Kossuth Ave., Bx., NY	Asst. V.P.
MacBain, Gavin K.	RFD#2, Mt. Kisco, NY	Exec.
MacDonald, Norman	155 Revolutionary Rd.,Scarborough,NY	Sales Exec
McRitchie, William A.	Northgate,Alger Ct.,Bnxville,NY	Vice Pres.
McVetty, James J.	1368 Metropolitan Ave.,Bx.,NY	Office Mgr.
Mann, John J.	10 Wildwood Circle,Larchmont,NY	Stock Brk.
Margolin, Morris	3510 Bainbridge Ave.,Bx.,NY	Real Estat
May, William S.	22 Hamilton Rd.,Scarsdale, NY	Sales Mgr.
Mayer, Edmund M.	135 W. 225 St., NYC	Asst. Prof
Mayers, Lawrence S.,Jr.	8 Rock La.,Scarsdale, NY	Importer
Mendelsohn, Mrs. Josephine	791 Park Ave., NYC	Housewife
Miller, Eric T.	13 Willow Circle,Bnxville,NY	Banker
Miller, Mrs. Rose	80 Van Cortlandt Park S., BxNY	Housewife
Multer, Mrs. Cela	711 Walton Ave.,Bx.,NY	Sec.
Norfleet, Norwood	1035 Fifth Ave., NYC	Stock Brok
O'Connor, Robert B.	Baldwin Rd.,Mt.Kisoc, NY	Arch.
Ollard, Harry G.	2121 Cedar Ave.,Bx.NY	Purch. El
O'Neil, Albert H.	815 Park Ave., NYC	Asst. V.P.
O'Neil, William	1575 Theriot Ave.,Bx.NY	Spec.Offic

O'Rourke, James J.	928 College Ave.,Bx.,NY	Retired-Bld
Orr, John C., 2nd	Box 36, Mt. Kisco, NY	Banking
Osit, Abe	900 Grand Concourse, Bx.,NY	Caterer
Parker, William W.	110 Riverside Dr., Apt.12F, NY	Engr.
Perilman, Mrs. Elizabeth B.	1050 Park Ave., NY 28, NY	Housewife
Perot s R.	54 Vermont Terr.,Crestwood, NY	Retired
Pierce, Frank [illegible]	119 N. Fulton Ave.,Mt.Vernon,NY	Engr.
Pollock, Miss Patricia	1590 Undercliff Ave.,Bx.,NY	Bookkeeper
Price, Will J.	19 Greenacres Ave.,Scarsdale, NY	Vice Pres.
Pulitzer, Mrs. Margaret L.	120 XXXX East End Ave.,NY	Housewife
Quinn, Marilyn	39 Davenport Ave.,New Rochelle,NY	Admin.
Rabin, Mrs. Syd	101 W. 55 St., NYC	Housewife
Regan, Roger	26 [illegible] Creston Ave., Bx.,NY	Retired
Reichman, Mrs. Vivian C.	64 Lincoln Ave.,Purchase, NY	Housewife
Richards, Mrs. Elizabeth A.	905 West End Ave., NYC	Research Mg
Rosenblum, Mrs. Frances	333 W. 56 St., NYC	Housewife
XXXXXX Rudinger, Charles R.	825 5th Ave., NYC	Exec.
Rusk, Mrs. Gladys H.	169 King St., Armonk, NY	Housewife
Ryan, Fortune P.	10 Gracie Sq., NYC	President
Samuels, Mrs. Dorothy	40 E. 88 St., NYC	Housewife
Satterlee, Stanton W.	108 East 82 St., NYC	Banking
Sawdon, Frank B.	135 E. 54 St., NYC	Advtg.
Schmidt, Joseph W.	2400 Webb Ave.,Bx.,NY	Advtg.
Scott, John A.	150 E. 56 St., NYC	Pres.
Scott, Mrs. Mateel G.	600 W. 111 St., NYC	Housewife

Seeman, Miss Mary	697 West End Ave., NYC	Buyer
Sharp, Robert W.	247 West 4th St., NYC	Stock & Bo
Singer, Mrs. Anna	315 8th Ave., NYC	Sec'y
Slate, Sam J.	25 Sutton Pl.So., NYC	Vice Presid
Slater, Ellis D.	299 Park Ave., NYC	Consultant
Smi.., Max	40 E. 9 St., NYC	Exec.
Socco, Nino J.	448 W. 47 St., NY 36, NY	Artist
Sprague, Mortimer E.	40 5th Ave.,NY 11,NY	Insur. Exec
Stanton, Mrs. Ruth	5 E. 92 St., NYC	Housewife
Stark, Frank F.	1130 Park Ave., NYC	Vice Pres.
Stegle, John R.	4023 Rombouts Ave.,Bx.,NY	Retired
Stevenson, Archibald E.	10 Oakstwain Rd.,Scarsdale, NY	Consultant
Strauss, Mr. Donald B.	44 E. 73 St., NY21,NY	Arbitratio
Swalwell, Mrs. Agnes	801 Riverside Dr., NYC	Retired Nu
Sweetser, George T.	14 Sutton Pl.So., NY	Ad. Exec.
Tankard, Henry J.	935 St. Nicholas Ave., NY	Ins. Brok
Ungar, Mrs. Edna	2164 Barnes Ave., NY 60, NY	Housewife
Waldman, M.E.	25 C.P.W, NYC	Invest. Ad
Walker, Mrs. Agnes	269 Piermont Ave.,Nyac NY	Housewife
Walker, George G.	1107 Fifth Ave. NY	Presiden
Watenhall, J. Huber	29 Cayuga St.,Rye, NY	Exec. V.P.
Wilke, Johan A.C.	15 Glen Oaks Dr.,Rye, NY	Bus. Exec.
Wilkinson, Frederick D.Jr.	595 E. 167 St.,Bx.56, NY	Buyer
Winter, Marvin S.	12 Shore Dr.,Rye, NY	Exec.
Zimmerman, Miss Clare	59 Lefferts Rd.,Yonkers, NY	Sec'y

FORM NO. 73 CERTIFICATE TO JURY LIST

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

I, Otto W. Schult, Deputy/ WILLIAM J. O'CONNELL, Clerk of the United States District Court for the Southern District of New York, DO HEREBY CERTIFY that the foregoing is a true list of the names and addresses of the individuals drawn by me and the Jury Commissioner on the 6th day of July 1966, to serve as Additional Grand Jurors at a session of the said Court, commencing on the 9th day of August 1966, at 10:15 o'clock in the fore~~after~~noon, and that the same was drawn in conformity with the statute in such case made and provided, and the order of said Court.

IN WITNESS WHEREOF, I have hereunto set my hand, and have caused the seal of said Court to be hereunto affixed, this 7th day of July 1966.

Otto W. Schult

Deputy Clerk

ROOM 315 — ADD. GRAND JURY — 10:15 A.M. — AUGUST 9, 1966 — HON. JOHN M. CANNELLA

[illegible], William A. (Foreman)	North Ave Alger C..,Pnxville,NY	Res. DA 7-[illegible] Bus. HA 5-2323
Jones, John J. (Deputy Foreman)	5532 Netherland Ave.,Ex.NY	Res. KI 6-[illegible] Bus. LR 5-277[illegible]
Almark, Milton	930 Fifth Ave., NYC	Res. RE 4-1802
Amberg, John L.	25 Hathaway Lane, White Plains, NY	Res. WH 9-3[illegible] Bus. YU 6-3410
Butler, Mrs. Gwendolin	39 Robin Hill Rd.,Scarsdale,NY	Res. SC 3-2131
Coughran, Tom B.	923 Fifth Ave., NYC	Res. RE 7-[illegible] Bus. RO 9-5500
Dale, John G.	360 E. 65 St., NYC	Res. RE 7-[illegible] Bus. TE 8-[illegible]
Droscher, Gustave	2 Washington Sq., NYC	Res. TE 4-705[illegible] Bus. HA 2-3340
Feldman, Mrs. Miriam	160 Riverside Dr., NY 24,NY	Res. EN 2-1453
Fenwick, Violet M.	3015 Roberts Ave.,Bx.,NY	Res. TA 2-1622
Frankel, Jerome	135 Wykagyl Terr.,New Rochelle, NY	Res. NE 6-134[illegible] Bus. HA 2-4200
Garsen, Mrs. Sylvia	414 E. 52 St., NYC	Res. MU 8-157[illegible] Bus. MU 3-53[illegible]
Goble, Emma S.	109 E. 88 St., NYC	Res. AT 9-32[illegible] Bus. AL 5-5252
Green, Mrs. Ruth	200 E. 57 St.,NYC	Res. MU 8-2233
Handelman, Donald E.	51 Lincoln Rd.,Scarsdale,NY	Res. SC 3-6709 Bus. 20 9-2340
Israels, Ruth G.	5 Riverside Dr., NYC	Res. EN 2-9252
Kaer, Pauline	230 West End Ave.,NYC	Res. EN 2-9560
Lasusa, Barbara	70 Marble Hill Ave.,NY	Res. LO 2-9648
Lee, Mrs. Fay	601 E. 20 St., NYC	Res. OR 4-8042
Reichman, Vivian C.	64 Lincoln Ave.,Purchase,NY	Res. WE 9-2025
Scott, Mateel G.	600 W. 111 St., NYC	Res. UN 4-4746
Ungar, Edna	2164 Barnes Ave.,Bx.,NY	Res. TA 3-4614
Winner, Marvin S.	12 Shore Rd.,Rye, NY	Res. OW 8-4770 Bus. MU 2-5434

-3-

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

66 Cr. 732

MATTHEW NAPHTALI, et al.,

Defendants.

STATE OF NEW YORK)
(ss.:
COUNTY OF NEW YORK)

WILLIAM M. KUNSTLER, being duly sworn, deposes and says:

I am a practicing attorney and a member of the Bars of the State of New York and the District of Columbia and maintain offices for the practice of law at 511 Fifth Avenue, New York, N.Y. I am one of the attorneys for defendant MATTHEW NAPHTALI herein and I am submitting this affidavit in support of his motion to dismiss the indictment herein.

From my personal observation and my inspection of data furnished to me by William J. Borman, the Jury Clerk of this district,*/ I am informed and verily believe that the method by which the Grand Jury which indicted said defendant was selected was unlawful and was in violation of the Constitution and statutes of the United States and in violation of the accepted and required standards for the selection of jurors in the federal courts, by reason of the fact that Negroes, Puerto Ricans and members of other racial, ethnic, national or socio-economic minorities were intentionally and systematically excluded from serving on said Grand Jury and that their participation on grand juries in this district has been intentionally and systematically limited since the creation of the Southern District of New York. Furthermore, the officials responsible for obtaining and compiling the names

*/ Deputy Clerk in Charge of the Jury Section

of prospective jurors failed to make reasonable efforts to secure the adequate representation of these minority groups on the list of prospective jurors or to obtain grand jury venires which were a fair and representative cross-section of the community from which they are purportedly drawn, namely, the eleven counties comprising the Southern District of New York.

I have made inquiry and am informed, and believe upon such information, that the following facts and circumstances exist in connection with the selection of the Grand Jury which indicted the defendant:

(a) The Southern District of New York is comprised of the counties of New York, Bronx, Westchester, Columbia, Dutchess, Greene, Orange, Putnam, Rockland, Sullivan and Ulster.

(b) The names of all prospective federal jurors, grand and petit, are selected from the registered voting lists of the counties of New York, Bronx and Westchester, for the presidential election.

(c) The procedure used by the Jury Commissioner and the Jury Clerk to secure the names of prospective federal jurors was and is as follows: the voting lists for a Presidential election year are received from the various election districts of New York and Bronx counties and from the cities and towns of Westchester County. According to the Jury Clerk, a blue card (Exhibit A) is sent to every fifth or tenth name */ on the aforesaid voting list summoning the persons so selected to appear in Room 113, United States Court House, Foley Sq., New York City, on a particular day "for examination as to their competency and qualification to serve as a juror." These summonses are sent

*/ The choice of fifth or tenth names is apparently left to the discretion of the individual deputy jury clerks.

out at the rate of 600 a week, 500 on Wednesday to selected election districts in Bronx and New York counties, and 100 on Thursday to selected towns and cities in Westchester County.*/ When the person so summoned appears, he completes AO Form 178 (8-60) (Exhibit B), "Questionnaire as to Qualifications for Jury Service". The Jury Commissioner and the Jury Clerk, with information received from the aforesaid questionnaire, complete a history card for each prospective juror whom they deem qualified for such service, (Exhibit C), and a white petit jury wheel card, (Exhibit D for men) and (Exhibit E for women).**/ Ordinarily the names of all persons who respond to Exhibit A are placed on the petit jury list but, as has been previously indicated, whenever the grand jury list falls materially below the desideratum of 2500 active names, replacements are transferred from the petit jury list. When this is done, blue history cards are completed (Exhibit F) and blue or green grand jury wheel cards prepared for the persons so transferred (Exhibit G for men; Exhibit H for women). Jurors are notified of their inclusion in grand and petit jury venires by the service of a summons (Exhibit I) by the United States Marshal via certified mail.

(d) The aforesaid questionnaires (Exhibit B) are kept for a period of five years and then destroyed. They are not available for public inspection.

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*/ The election districts and cities and towns change from week to week in order, according to the Jury Clerk, to include, eventually, all of them.

**/ In some instances, where prospective jurors express a preference for grand rather than petit jury service, a blue grand jury wheel card is completed for them.

(e) The names of the Grand Jurors who indicted defendant Naphtali were drawn from the jury wheel on or about May 27, 1966.

(f) At the time of said drawing the jury wheel contained approximately 755 names of qualified persons.

(g) Upon information and belief the aforesaid 755 names were placed in said jury wheel by Herbert Peterfreund, United States Jury Commissioner for the Southern District of New York and William J. Borman, Jury Clerk for the Southern District of New York (herein referred to as the Jury Commissioner and the Jury Clerk) on or before May 27, 1966.

(h) Upon information and belief the aforesaid 755 names had been selected by the Jury Commissioner and the Jury Clerk from a list of 2,329 names, of which 1,813 were men and 516 women.

(i) It is the custom of the Jury Commissioner and the Jury Clerk to maintain approximately 2,500 names on the grand jury list. The depletions due to changes in residence, illness, death, etc., are replenished from the petit jury list.

(j) The last such replenishment took place on March 17, 1965, when the names of 100 petit jurors were transferred to the grand jury list.

(k) A grand jury venire, containing at least 75 names, is returnable, pursuant to a standing order of this Court, on the first Tuesday after the first Monday of each term of Court.

(l) It is the custom of the Jury Commissioner and Jury Clerk to carry the names of certain qualified jurors from one venire to another when these persons do not appear on the date for which they have been summoned. The names of these jurors, referred to as "put-overs", */ may be placed in the jury wheel at some future time and do not therefore ordinarily appear on the venire list for that term of Court.

(m) A substantial portion of the names on any grand jury list were names which had appeared on the preceding jury

*/ Four such "put-overs" appeared on the Grand Jury that indicted defendant. (Exhibit 4)

list after the deletion of the names of persons who had died, moved away, or otherwise become unqualified for further jury service.

(n) No method is used in selecting names to be added to the grand jury list or placed in the grand jury wheel in order to secure an adequate representation of the various ethnic, racial, economic or social groups in the Southern District.

(o) Reasonable efforts were not made and have never been made by the Jury Commissioner and the Jury Clerk to make certain that names on the grand jury list were "drawn from every economic and social group of the community without regard to race, color or politics ..." Knox Committee Report of 1942, 93 Cong. Rec. 5712, or represented "a fair cross-section of the community." Rabinowitz v. United States, 366 F.2d 34, 55 (1966).

(p) The Jury Commissioner and the Jury Clerk failed to familiarize themselves fairly with the qualifications of eligible jurors of the Southern District without regard to race, ethnic or national origin or economic or social status.

(q) In the selection of the names of prospective grand jurors from among whom the members of the grand jury which indicted defendant Naphtali were chosen, the Jury Commissioner and the Jury Clerk followed a course of conduct which operated to discriminate on racial, ethnic, economic or social grounds in the selection of such jurors.

(r) Upon information and belief, although Exhibit A provides that "the penalty for failure to attend is contempt of court", no such punishment has ever been sought by the Jury Commissioner or the Jury Clerk against persons who do not respond thereto. Occasionally, a spot check is conducted to determine the reason or reasons why a prospective juror fails to appear at the United States Court House.

(s) The population and race of persons aged 21 years or over of the eleven counties which comprise the Southern District of New York, according to the 1960 United States census was as follows:

Counties	Total Population	Non-White Population
New York	1,257,867	287,817
Bronx	965,315	100,255
Westchester	526,518	40,343
Columbia	30,401	750
Dutchess	116,036	6,826
Greene	20,188	431
Orange	116,324	5,089
Putnam	19,748	104
Rockland	83,365	4,151
Sullivan	29,177	1,009
Ulster	75,551	2,295

4. I further made inquiry and am informed and believe upon such information that this course of conduct has been systematic and long-continued and has occurred for many years.

5. The venire from which the grand jury which indicted defendant Naphtali was drawn (Exhibit K), which is typical of venires for at least the past five years, is clearly and unmistakably not "a fair cross-section of the community". Not only was it compiled for only three of the eleven counties comprising this district, but it is so oriented on racial, economic and scoial lines that it is the very antithesis of even the narrowest construction of the word "representative".

6. In reaching my conclusions as to the racial, economic and social bias of the grand jury list, I personally examined file copies of the following venires for the years indicated:

Year	Filed	Returnable
1961	11/7/60	1/3/61
	12/15/60	2/7/61
	1/21/61	3/7/61
	3/8/61	3/28/61
	3/15/61	5/2/61
	4/13/61	6/6/61
	5/25/61	7/5/61
	6/15/61	8/8/61
	7/14/61	9/5/61
	8/28/61	9/19/61
	9/7/61	9/26/61
	8/3/61	10/3/61
	9/27/61	10/17/61
	9/15/61	11/8/61
	10/9/61	12/5/61
1962	10/31/61	1/2/62
	12/7/61	1/9/62
	1/3/62	1/30/62
	1/18/62	2/1/62
	12/8/61	2/6/62
	1/9/62	3/6/62
	3/8/62	3/22/62
	3/9/62	3/27/62
	2/6/62	4/3/62
	4/13/62	4/26/62
	3/5/62	5/8/62
	5/1/62	5/15/62
	4/9/62	6/5/62
	6/6/62	6/26/62
	5/11/62	7/3/62
	5/31/62	8/7/62
	7/12/62	9/4/62
	8/13/62	10/2/62
	9/17/62	11/7/62
	10/30/62	11/13/62
	10/22/62	12/4/62
1963	12/18/62	1/8/63
	12/27/62	1/11/63
	12/18/62	2/5/63
	1/11/63	3/5/63
	2/20/63	3/12/63
	3/1/63	4/2/63
	3/26/63	4/10/63
	4/5/63	4/23/63
	3/15/63	5/7/63
	4/17/63	6/4/63
	5/22/63	7/2/63
	6/24/63	8/6/63
	7/24/63	8/7/63
	7/22/63	9/3/63
	9/5/63	9/18/63
	8/28/63	10/8/63
	10/11/63	10/23/63
	9/23/63	11/6/63
	11/14/63	11/21/63
	10/28/63	12/3/63

Year	Filed	Returnable
1964	11/27/63	1/7/64
	12/26/63	2/4/64
	2/11/64	2/25/64
	2/25/64	4/7/64
	3/18/64	5/5/64
	4/15/64	6/2/64
	5/22/64	6/4/64
	5/18/64	7/7/64
	6/19/64	7/14/64
	6/16/64	8/4/64
	7/15/64	9/8/64
	9/8/64	10/6/64
	10/7/64	10/20/64
	9/24/64	11/4/64
	10/27/64	12/8/64
1965	11/10/64	1/5/65
	11/30/64	1/7/65
	12/15/64	2/2/65
	1/20/65	3/2/65
	3/1/65	3/16/65
	2/9/65	4/6/65
	3/22/65	4/13/65
	3/18/65	4/4/65
	4/13/65	6/8/65
	5/13/65	7/6/65
	6/15/65	8/3/65
	7/8/65	9/7/65
	9/2/65	9/28/65
	8/18/65	10/5/65
	9/22/65	11/3/65
	10/20/65	12/7/65
1966	11/23/65	1/4/66
	12/1/65	1/11/66
	1/11/66	2/1/66
	12/28/65	2/8/66
	1/19/66	2/9/66
	1/27/66	3/8/66
	2/9/66	4/5/66
	3/23/66	4/26/66
	3/14/66	5/3/66
	4/12/66	6/7/66
	5/2/66	5/17/66
	5/18/66	7/5/66
	6/14/66	8/2/66
	7/7/66	8/9/66
	7/26/66	9/6/66
	8/18/66	10/4/66
	9/23/66	10/1/66
	10/14/66	11/1/66
	10/8/66	12/6/66
	11/22/66	1/3/67

7. Even a cursory study of those venires will indicate that virtually all of the persons named thereon, with the exception of those classified as "retired" or "housewife" hold executive positions of one sort or another. For example, with respect to the venire from which the grand jury that indicated defendant Naphtali was chosen, such names as Edwin S. Friendly, Jr., the well-known television executive, Raymond Loewy, the celebrated industrial designer and Arthur Maisel, the restauranteur, appeared thereon. In addition, there were 11 housewives, 11 executives, 6 retired persons, 3 sales engineers, 3 accountants, 5 bankers, 2 real estate brokers, 2 chemists, 1 insurance broker, 1 builder, 5 administrators, 1 clerk, 1 "partner", 1 installer-dispatcher and one person listed only as "textiles". Clearly, these are only a limited number of the occupations of persons residing in the Southern District of New York. Such work-a-day positions as waiters, janitors, domestics, elevator operators, department store clerks, salesmen, garment center operators, subway personnel, bus and taxi drivers, gardeners and the like, are conspicuous by their absence.

8. It is also obvious from surveying this and other venires that there are virtually no Puerto Ricans, very few Italians and only an occasional Negro thereon. Since race is not included on the questionnaire, the presence or absence of Negroes can only be determined by reference to the residences which are set forth on the venire list. From my knowledge of the City of New York and the County of Westchester, it is my considered opinion that most of the addresses indicate white only residential areas of more than average income. For example, there are five persons living in the more exclusive sections of Park Avenue, four in similar areas on Fifth Avenue, 3 from Sutton Place South and 18 from the fashionable East Side. There does not seem to be a single Harlem address on the venire list and not a single Puerto Rican name. The suburbs represented are almost exclusively confined to Scarsdale (6), Bronxville (2), White Plains (2), Briarcliff Manor, Pelham, Rye, Irvington, Pound Ridge, Greenburgh and Mt. Kisco, traditional wealthy suburban areas.

9. On another venire list filed on September 20, 1966, and returnable on November 9, 1966 (Exhibit L), the same pattern appears. As for occupations, there are 21 executives, 7 housewives, 4 retired persons, 6 advertising personnel, 7 stockbrokers, 1 investment counsellor and a variety of such occupations as book publishers, television producers, chemists, accountants, petroleum geologists and freelance artists and writers. Only a clerk-receptionist, a teacher and an assistant chief clerk spoil the pattern ever so slightly. As for addresses, 5 live in the fashionable sections of Park Avenue, 2 on East End Avenue, 3 on Sutton Place South, 2 in the wealthier areas of Fifth Avenue, and 20 in the more opulent East Side sections of Manhattan. Again, the suburbs are represented by such upper-middle class white-only centers as Scarsdale (4), Pelham (3), Larchmont (5), New Rochelle (2), Harrison, Dobbs Ferry, Mamaroneck and Rye. While there were six names of apparently Italian origin on the first venire analyzed above, there seems to be only 1 on this one. There are also apparently no names of Puerto Rican origin on the list and no addresses reflective of the traditional Negro residential areas of the three counties from which the names have been selected.

10. Although the jury clerk maintains that the grand jury lists are compiled on a purely random basis of selection, it is obvious that, in the light of the results of such selection, this is patently impossible. As Mr. Justice Frankfurter said in his separate opinion in Cassell v. State of Texas, 339 U.S. 282, 293 (1950):

> "If one factor is uniform in a continuing series of events that are brought to pass through human intervention, the law would have to have the blindness of indifference rather than the blindness of impartiality not to attribute the uniform factor to man's purpose. The purpose may not be of evil intent or in conscious disregard of what is conceived to be a binding duty. Prohibited conduct may result from misconception of what duty requires."

. . . . The federal standard is clear. "If a fair cross-section is constantly lacking, then without more, it is established that the commissioners have failed in their duty." United States v. Rabinowitz, supra, at 58. My perusal of 107 consecutive venires from January 3, 1961 to date has convinced me that that standard has not been met. The self-perpetuating grand jury list restricted to virtually one well-defined stratum of society is hardly one drawn "from the widest possible cross-section of the people..." [Senate Subcommittee of the Committee on the Judiciary, on S. 17, S.18, S. 19, 80th Cong., 1st Sess. (1947) 85-86]

One source of the narrowing process that obviously takes place in the compilation of the grand jury list is the nature of some of the 19 questions on Exhibit B , the "Questionnaire as to Qualification for Jury Service". Only eight of the questions, viz., 2,4,7,8,9,16,18 and 19, have any relevancy to any of the qualifications of federal jurors as prescribed in 28 U.S.C. 1861. In particular, questions 10,11,12, 13, 14 and 15 are wholly unrelated to these qualifications and can only be pertinent to economic and social status.

Of equal significance is the winnowing performed by the Jury Commissioner and the Jury Clerk from these same questionnaires. The decision made by these officials is apparently not subject to review by any other agency or office and is not ever communicated to those who have executed the questionnaires. No further word other than the receipt of a jury summons by those judged qualified by the Jury Commissioner and the Jury Clerk is received by prospective jurors.

Enough has been shown above to merit at least a hearing on the issues raised by this motion. The testimony of the officials in charge of grand jury selection, the venires from 1961 or earlier to date, the questionnaires as to qualifications --

these must be available to the court before any intelligent disposition of the grave issues raised herein can be made.

WHEREFORE, it is respectfully prayed that this motion be granted in all respects or, in the alternative, that the issues herein be set down for a prompt hearing.

William M. Kunstler

Sworn to before me
this 27th day of December, 1966.

Notary Public
Commission Expires

THIS IS A LEGAL NOTICE

You are hereby summoned to appear personally at Room 113, United States Courthouse, Foley Square, New York City, on _____ between 9:30 A. M. and 4:00 P. M. for examination as to your competency and qualification to serve as a Juror.

You may have an opportunity to claim exemption from service if you are entitled thereto by law.

YOU MUST APPEAR IN PERSON. BRING THIS NOTICE WITH YOU.

THE PENALTY FOR FAILURE TO ATTEND IS CONTEMPT OF COURT.

FOR INFORMATION
Phone - 264-6571

JAMES E. VALECHE, Clerk
United States District Court
Southern District of New York

EXHIBIT "A"

A O FORM 172 (5-60)

QUESTIONNAIRE AS TO QUALIFICATION FOR JURY SERVICE

1. Name (Please print) _____

2. Home address _____
(Street) (City) (Zone) (State)

3. Telephone: Business _____ Residence _____

4. How long have you resided there? _____ Yrs. In this State? _____ Yrs

5. Married or Single? _____ Age _____ Sex _____

6. Place of birth _____

7. Are you a citizen of the United States _____

8. Can you read, write, speak, and understand the English language? _____

9. If naturalized, state when _____ (Where) _____

10. What education have you had? _____

11. Are you employed at present? _____ (Occupation) _____

12. Nature of business? _____

13. Employer's name _____

14. Business address _____

15. a. If you are married, give occupation of wife or husband _____

b. If you are a married woman, give occupation before marriage _____

c. If you are retired, or not working, give last occupation _____

16. Have you ever been convicted of a crime? _____
If so, state date, court and crime _____

17. Have you ever served as a juror? _____ If so, in what Court? _____
_____ and when? _____

18. Have you any disability impairing your capacity to serve as a juror, including impaired eyesight or hearing? _____ (Yes or No) If so, state its nature and extent.

19. Do you know any reason why you cannot serve as a juror? _____
If so, state reason fully under remarks.

Remarks: _____

I certify that the foregoing statements are to the best of my knowledge and belief.

Date: _____ XX _____
Signature

EXHIBIT 271A

NAME _____ MONTH SELECTED _____

RESIDENCE _____

BUSINESS ADDRESS _____

OCCUPATION _____

DATE OF BIRTH		DATE QUALIFIED		PUT IN WHEEL	

EXHIBIT "C"

Name _____

Residence _____

Occupation _____

Firm Name _____

Business Address _____

EXHIBIT "D"

Name _____

Residence _____

Business Address _____

Occupation _____

Former Occupation _____

Husband's Occupation _____

EXHIBIT "E"

NAME _____ SELECTED GRAND JUROR

RESIDENCE _____

BUSINESS ADDRESS _____

OCCUPATION _____

DATE OF BIRTH	DATE QUALIFIED	PUT IN WHEEL	

EXHIBIT "F"

GRAND JUROR

Name _____

Residence _____

Occupation _____

Firm Name _____

Business Address _____

EXHIBIT "G"

GRAND JUROR

NAME _____

RESIDENCE _____

BUSINESS ADDRESS _____

OCCUPATION _____

FORMER OCCUPATION _____

HUSBANDS OCCUPATION _____

EXHIBIT "H"



SUMMONS TO APPEAR AS A GRAND JUROR IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

The Marshal has no control over the Jury Lists and cannot excuse any person from Jury Duty. Persons claiming exemption or desiring to be excused must present such claim or excuse in open court, at the day and hour mentioned in this summons.

The courtroom in which this summons is returnable is Room No. 318 on the third floor in the U. S. Courthouse, Foley Square, New York City.

TO

YOU ARE HEREBY SUMMONED to attend a United States District Court to be held in and for the Southern District of New York, in the United States Courthouse, at Foley Square, in the City of New York, on _____, 19___, at 10:15 o'clock in the forenoon of that day, as a GRAND JUROR.

Dated _____, 19___.

John J. Dlear Jr.

Clerk of the United States District Court for the Southern District of New York

VOID

Jurors Are Entitled to $10.00 for Each Day's Attendance
$250 FINE FOR NONATTENDANCE

FOR INFORMATION PHONE - 264-4571

(OVER)

EXHIBIT "I"

Room 318 — GRAND JURY — 10:15 A.M. — HON. DUDLEY B. BONSAL

AUGUST 2, 1966

Fluegelman, Milton (FOREMAN)	31 Morris Lane, Scarsdale NY	Res.(914)SC 3-6162 Bus.LE 2-0884
Elliman, Donald M. (ASS'T. FOREMAN)	51 Valley Road, Bronxville,NY	Res.(914)DE7-6950 Bus.RE 2-2200
Adams, John J.	1368 Metropolitan Ave. Bronx NY	Res.TA 9-2244 Bus.PL 3-4883
Baskind, George	800 Gr. Concourse, Bronx NY	Res.Cy 2-1391 Bus.YU 6-4866
Cohen, George N.	58 Brite Ave. Scarsdale NY	Res.(914)SC 3-1631 Bus OR9-2267
Conforti, Guy	17 Benedict Place Pelham NY	Res.(914)PE 82485 Bus.ST 4-2500
Foster, John H.	379 Rye Beach Ave. Rye NY	Res.(914)WO7-1874 Bus. 972-4724
Hatch, Alden D.	221 E. 78th Street NYC	Res. RH 4-2653 Bus. Pl 1-3600
Jackson, William M.	43 Lawrence Ave. White Pl. NY	Res.(914)Wh67771 Bus.OR 9-1880
Janis, Jacob W.	25 Chester Drive Rye NY	Res. (914) OW8-783 Bus. TN7-0830
Lynch, Dennis J.	621 East 241st Street Bronx NY	Res.994-7338 Bus.460-3536
Marks, Bert	1025 5th Ave. NYC	Res. Re 7-7344 Bus. LO-4-6000
McDonald, Edward A.	2015 Monterey Ave. Bronx NY	Res. Cy9-4166 Bus. 5523024
Morgan, J. S.	40 East 10th Street NYC	Res.GR 3-4055 Bus. Same
Nuttall, Carrie B.	25 Sutton Pl. So. NYC	Res.TE 8-8798 Bus.PL 5-9440
O'Neil, Daniel J.	510 East 23rd Street NYC	Res.OR 3-8171 Bus. 393-3313
Panebianco, Dominick J.	1631 Bayview Ave. Bronx NY	Res. TA9-4218 Bus. MO 9-5856
Patterson, Warren B.	15 Hayes Street Blauvelt NY	Res. EL 9-2767 Bus. TA 3-9940
Reiter, Carl J.	41 Cooper Drive New Rochelle NY	Res. (914) 235-345 Bus. "390-7676
Seeland, Mrs. Edith K.	215 East 79th Street NYC	Res. RH 4-6484 Bus. NONE
Shanley, Daniel K.	1 West 54th Street NYC	Res. CI 7-2100 Bus. IN 7-6860
Shea, Jeremiah	1808 Park View Ave. Bronx NY	Res. TA 2-3049 Bus. NONE
Struby, Katherine	350 East 52nd Street NYC	Res. PL 3-5632 Bus. NONE

E X H I B I T "J"

JUN 14 1966
S. D. OF N. Y.

GRAND JURY
ROOM 318
AUGUST 2, 1966
HON. DUDLEY B. BONSAL

SOUTHERN DISTRICT OF NEW YORK: SS

PANEL OF GRAND JURORS for a United States District Court fro the Southern District of New York, to be held in the United States Court House, Foley Square, in the Borough of Manhattan, in the City of New York, on the 2nd day of August 1966, at ten-fifteen o'clock in the forenoon. Drawn by the Deputy Clerk, Otto W. Schult, and the Jury Commissioner on the 27th day of May 1966, in conformity with the statute in such case made and provided and the order of said Court.

NAME	ADDRESS	OCCUPATION
Adams, John J.	1368 Metropolitan Ave., NY	Office Supvr.
Anderson, George	237 E. 20 St., NYC	Public Relations
Avella, Salvatore R.	250 E 200 St.,Bx.,NY	Civil Engr.
Blitzer, Edward H.R.	75 C.P.W., NY 23, NY	Sales Engr.
Blumbert, Joseph	2115 Grand Ave., Bx., NY	Writer
Caffyn, Harold R.	320 E. 53 St., NY	Retired
Cohen, George N.	58 Brite Ave.,Scarsdale, NY	Pres.of Firm
Colby, Mrs. Augusta S.	3240 Henry Hudson Pkwy, NY	Housewffe
Conforti, Guy	17 Benedict Place, Pelham, NY	Gen. Mgr.
Cowen, Lawrence	2 Sutton Place So., NYC	Finance
Cragin, Donald W.	70 E. 10 St., NYC	Investor-Director
D'Angelo, Anthony	1245 Choctaw Pl.,Bx.61, NY	Builder
Deering, James A.	25 E. 67 St,NY 21, NY	Ins. Broker
Drexler, Frederick H.	1075 Park Ave., NY	Retired
Elliman, Donald M.	51 Valley Rd.,Bnxville,NY	Comm. Banking
Elliott, Lloyd W.	880 Fifth Ave., NY	Exec.
English, James J.	1680 Metropolitan Ave.,NY62,NY	Underwriter
Fanelli, Joseph A.	9 Winding Wood Rd.,Pt.Chester,NY	Auto Dealer
Fardwell, Harry R.	25 E. 9 St., NYC	Treasurer
Fixler, Philip	2230 Cruger Ave.,Bx.67,NY	Traffic Mgr.
Fluegelman, Milton	31 Morris Lane, Scarsdale,NY	Textiles
Friendly, Edwin S.,Jr.	544 E. 86 St., NYC	TV Exec.
Gessner, Harold B.	880 Fifth Ave., NYC	Exec.
Ginsberg, Leonard	480 Park Ave.,NY	consultant
Graham, Richard S.	18 Stuyvesant Oval, NYC	Brokerage Admin.& Sales

EXHIBIT "K"

25-

Grant,Ernest M.	188 St.Nicholas Ave.,NYC.,	R.E.Broker
Greenwald,Samuel H.	20 Olmsted Rd.,Scarsdale,NY.,	Sales Mgr.,
Hatch,Alden Denison	308 E.71St.,NY.21,N.Y.,	Publ. & Prom.
Herman,Adele	2149 Bogart Ave.,Bx.,N.Y.,	Housewife
Jackson,William M.	43 Lawrence Ave.,White Pls,NY.	Lab Technician
Janis,Jacob W.	25 Chester Dr.,Rye,N.Y.,	C.P.A.
Johnston,William S.	65 Morris La.,Scarsdale,NY.,	Retired
Keer,Pauline	230 West End Ave.,NYC.23,NY	Homemaker
Knox,John A.,	Fargo Lane,Irvington,NY.,	Banking
Kohnstamm,Paul L.	RFD#1, Pound Ridge,N.Y.,	Mfg.Chemist
Korn,Richard K.	898 Park Ave.,NYC.,	Executive
Landau,Constance S.	262 Central Pk.West,NYC.,	Retired
Levy,Norman F.	1160 Park Ave.,NYC.,	Real Estate
Lewis,Ralph F.	Hyatt Rd.,Briarcliff Manor,NY.,	Partner
Lippincott,Norman W.	1320 Riverside Dr.,NYC.33,NY.,	Ins.Broker
Loewy,Raymond	900 Fifth Ave.,NYC.,	Head of Firm
Loud,Nelson	10 Gracie Sq.,NYC.,	Investment Banker
Lundbergh,Holger	169 E.78th St.,NYC.,	Journalist
Lynch, Agnes M.,	2055 McGraw Ave.,Bx.,NY.,	Housewife
Lynch,Caroline Hudson	720 Park Ave.,N.Y.C.,	Housewife
Lynch, Dennis J.,	2279 University Ave.,Bx.,NY.,	Sr.Technician
Maisel,Arthur	60 Sutton Pl.So.,NYC.,	Restaurateur
McCormick,Edward A.,	4 Midland Gardens,Bronxville,NY	Executive
McDonald, Edward A.,	2015 Monterey Ave.,Bx.,NY.,	Clerk
McHugh, James J.,	18 Hampton Rd.,Scarsdale,NY.,	Sales Engr.

Moran, Charles,Jr.,	Box T.RFD#2,Tripps,Mt.Kisco	Security Broker
Morgan, John S.	40 East 10th St.,NYC.,	
Nuttall, Carrie B.,	25 Sutton Pl.So.,NYC.,	Corp. Treas.
O'Neil, Daniel J.,	510 E. 23 St.,NY.10,NY.,	Administrative
Oransky, Jerome I.,	5610 Netherland Ave.,Bx.,NY.,	Bookkeeper
Palmer, F. Morgan	139 E.79 St.,N.Y.,N.Y.,	Banker
Palumbo, Michael	300 Gramatan Ave.,Mt.Vernon,NY.	Cashier
Panobianco,Dominick J.	1631 Bayview Ave.,Bx.,N.Y.,	Ins.Broker
Patterson Warren B.,	15 Hayes St.,Blauvelt,NY.,	Installer Dispatche
Pollack, Lillian	108 E. 38 St.,NY 16,NY.,	Housewife
Potter, John A.,	1 Carmine Rd.,Scarsdale,NY,	Retired
Reiter, Carl J.,	41 Cooper Ctr.Rd.,Wh.Pl.NY.,	Division Supervisor
Rhodes, Paul E.,	55 Park Terrace East,NY.,NY.,	Financial Consult.
Rosenberg,Sidney	910 Grand Concourse,Bx.51,NY.,	Accountant
Sas, Anne G.,	475 W. 186th St.,N.Y.,NY.,	Homemaker
Saypol, Roger L.,	152 E. 94th St.,N.Y.,NY.,	Adv. Exec.,
Schechtman,Ellis H.,	3 E.69th St.,NYC.,	Executive
Seeland, Edith K.,	215 E. 79th St.,NYC.,	Housewife
Shea, Jeremiah	1808 Park View Ave.,Greenburgh,NY	Retired
Sherwood, Minnie K.,	40 E.88 St.,NYC.,	Housewife
Sobol,Benjamin	Fair St.,Wh.Plains,NY.,	Executive
Struby, Katherine	350 E.52nd St.,NYC.,	Housewife
Taylor,Davidson	345 E.57th St.,NYC.,	Director Arts
Werner, Gerson M.,	200 Haven Ave.,NYC.,	Theatre Executive
Zahn,Sarah Christie,	1010 Fifth Ave.,Ny28,NY.,	Housewife

U.S. FILED COURT
JUN 14 1966
S. D. OF N. Y.

10:15 A.M.
GRAND JURY
ROOM 318
AUGUST 2, 1966
HON. DUDLEY B. BONSAL

SOUTHERN DISTRICT OF NEW YORK: SS

PANEL OF GRAND JURORS for a United States District Court fro the Southern District of New York, to be held in the United States Court House, Foley Square, in the Borough of Manhattan, in the City of New York, on the 2nd day of August 1966, at ten-fifteen o'clock in the forenoon. Drawn by the Deputy Clerk, Otto W. Schult, and the Jury Commissioner on the 27th day of May 1966, in conformity with the statute in such case made and provided and the order of said Court.

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SEP 20 1966
S. D. OF N. Y.

GRAND JURY
ROOM XXII 318
NOVEMBER 9, 1966
HON. HAROLD TYLER, JR.

SOUTHERN DISTRICT OF NEW YORK: SS

PANEL OF GRAND JURORS for a United States District Court for the Southern District of New York, to be held in the United States Court House, Foley Square, in the Borough of Manhattan, in the City of New York, on the 9th day of November 1966, at ten-fifteen o'clock in the forenoon. Drawn by the Deputy Clerk, Otto M. Schult, and the Jury Commissioner on the 2nd day of September 1966, in conformity with the statute in such case made and provided and the order of said Court.

NAME	ADDRESS	OCCUPATION
Abrams, Joseph L.	1185 Park Ave., NYC	Invest. Banking
Akers, James R.	12 Barry Rd.,Scarsdale, NY	Sales
Barnes, Paul S.	390 First Ave., NYC	Exec.
Bender, Martin	100 Pelham Rd.,New Rochelle,NY	Elect. Engr.
Best, Marshall A.	424 E. 52 St., NYC	Book Publisher
Bianco, Victor	4021 Secor Ave.,Bx.,NY	Prod. Mgr.
Blodgett, Thurston P.	1 East End Ave., NYC	Invest. Banker
Blum, John A.	120 E. 65 St., NYC	Exec.
Brady, Walter F.	132 Valley Stream Rd.,Larchmont,NY	Insurance
Branch, William B.	53 Cortlandt Ave.,New Rochelle,NY	TV Producer
Brayer, William H.	70 E. 10 St., NYC	Exec.
Brennan, Francis E.	40 E. 62 St., NYC	Vice Pres.
Brown, Jack	223 Ferndale Rd.,Scarsdale, NY	Salesman
Burke, Michael	1172 Park Ave., NY 28,NY	Business Exec.
Cahil, Joseph A.	Gipsy Trail Rd.,Carmel, NY	Mfgr.
Classon, Bruce D.	58 Birchwood Ave.,Hartsdale,NY	Asst. Sec'y
Cocke, Emmett O.	249 E. 48 St., NYC	Sr. VP Gen. Mgr.
Conner, Eliot	40 Brace Terr.,Dobbs Ferry, NY	Self
Connor, Francis D.	1555 Odell St., NYC	Broker
Dial, Mrs. Thelma	545 Edgecomb Ave.,Wash. Hgts.,NY	Housewife
Flynn, Edward F.	461 Highbrook ave.,Pelh.Mnr.,NY	Advtg. Exec.
Ford, Gerard W.	160 E. 78 St., NYC	Employment Agent
Fox, John M.	110 East End Ave., NYC	Advtg.
Gavan, Gordon S.	153 E. 18 St., NYC	Invest. Counsel
Gillin, Jack	1186 Pelham Pkwy So.,Bx.,NY	Supt.

EXHIBIT "L"

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Gluckman, Herman	140 Riverside Dr., NY	Treasurer
Goulden, Miss Regina A.	3236 Tierney Pl., Bx., NY	Controllers
Graf, George J.	1855 Gr. Concourse, Bx., NY	Admin. Asst. to V. P.
Green, Mrs. Eleanor	162 W. 56 St., NY	Allergy Chem.
Gutman, Daniel L.	1 Kelwynne Rd., Scarsdale, NY	Stock Broker
Hackney, Roger	20 Maple Ave., Larchmont, NY	Vice Pres.
Holderman, Archibald R.	315 E. 68 St., NY	Free Lance Artist
Jefferson, Floyd W. Jr.	1 Sutton Pl. So., NY	President
Johnson, Wilber C.	91 Hickory Grove Dr., Larchmont, NY	Accountant
Jorgensen, Frank E.	200 E. 66 St., NY	Ins. Exec.
Kapp, David	200 E. 57 St., NY	Exec.
Kindler, Albert	1 Macy Ave., Wh. Pl., NY	Real Estate
King, Robert E.	580 Shore Acres Dr. Mamaroneck, NY	Pet. Geologist
Koff, Murray	25 Sutton PL. So., NY	Advertising
Leon J.	15 Marcy Pl., NY	Advertising
an, Julius	11 Stuyvesant Oval, NY	Sr. Claim Approver
Lauman, Mrs. Anne E.	215 W. 88 St., NY	Housewife
LeGrand, Coleston W.	218 Tecumseh Ave., Mt. Vernon, NY	Clerk & Receptionist
Lesley, Morton	365 W. 7?th St., NY	Free Lance Writing
Leung, Solomon W.	5 Union Ave., Harrison, NY	Sales Engr.
Levy, Aaron J.	480 Park Ave., NY	President
Lewis, Madison H.	12 E. 73 St., NY	Retired
Lidgerwood, William Van V.	1111 Park Ave., NY	Publ. Rels. & Adv.
Livingston, Mortimer P.	123 E. 37th St., NY	Retired
Mabon, James B. Jr.	570 Park Ave., NY	Bond Dealer

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Mayers, Mrs. Gloria	9 E. 79 St., NYC	Housewife
McMains, Charles V.	284 So. Columbus Ave.,Mt.Vernon,NY	Sales Mgr.
McMaster, Robert J.	225 Cliff Ave.,Pelham,NY	Deputy Comptroller
Mebel, Selma F.	240 Central Park So., NYC	Homemaker
Meyers, Norman G.	1056 5th Ave., NY,NY	President
Milstein, Seymour	35 Ogden Rd.,Scarsdale, NY	Exec.
Mochrie, Robert	530 E.86 St., NYC	VP & Gen. Mgr.
Muir, Mrs. Frances T.	435 E. 52 St., NYC	Housewife
Nahigian, Dican	103 Lexington Ave., NYC	Teacher
Pomerantz, Frank	Brookside Apts.,Rye, NY	Comptroller
Powers, David C.	603 Monterey Ave.,Pel. Mnr., NY	Trust Officer
Pratt, Miss Beryl L.	11 5th Ave., NYC	Staff Asst.
Reeves, Caroline B.	215 E. 68 St., NYC	--
Rimai, Emanuel	2090 Barnes Ave.,Bx.,NY	Engr.
Rose, Stanley H.	11 Hazel La.,Larchmont, nY	Mdse. Mgr.
Sallick, Mrs. Marion M.	45 Gramercy Park No.,NYC	Housewife
Sheridan, John P.	16 Metropolitan Oval,Bx.,NY	Asst. Chief Clk.
Shorter, Walter C.	1060 5th Ave., NYC	Vice Pres.
Sollfrey, Lewis S.	30 E. 65 St., NYC	Investments
Sweetser, Mrs. Eugenia N.	14 Sutton Pl.So., NYC	Housewife
Tracy, William T.	133 E. 80 St., NYC	Exec.
Tuck, Theodore E.	76 W. Garden Rd.,Larchmont, NY	Sales Mgr.
Tuttle, Mrs. Edith H.	181 E. 93 St, NYC	Housewife
Vickers, Murray A.	140 E. 40 St., NYC	Retired
Wener, Lawrence	4555 Henry Hudson Pkwy W., NY	Retired

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[383] BY MR. ARMSTRONG:

Q Mr. Morley, answer the question, what was the conversation that you had at that time with Mr. Wolfson?
A I told Mr. Wolfson that the Dow Jones ticker just carried an article announcing that William Shea and Martin Segal were elected to the board of American Motors as his representatives, and told him that I had received a call from our partner in New York instructing me to accept no more sell orders in American Motors from Mr. Wolfson nor his family. Mr. Wolfson asked me who gave me those instructions. I told him it was our partner and our lawyers in New York. He asked me if I thought that our lawyers were better than his lawyers and I told him no, but that we were a regulated industry and that we had to do what our lawyers told us to do because the penalty on the broker was very severe.

Q Did you -- MR. GOULD: May I inquire is the witness consulting any notes? [384] MR. ARMSTRONG: No, I will take it back, it is an exhibit given to him to refresh his recollection to this date. I am taking it back. THE COURT: What exhibit was that? MR. ARMSTRONG: 4-A, Your Honor. THE COURT: Very well.

Q Did you tell Mr. Wolfson in this phone conversation why you were declining to accept any further trades?

MR. GOULD: I object to that as to form. THE COURT: Overruled. A I told him that we could accept no sell orders because the election of Martin Segal and William Shea to the board as his representatives was the same as if he wereon the board himself. That was our firm's interpretation.

Q Did you speak with him about the significance of his being on the board. MR. GOULD: If your Honor please, I think this witness ought to be permitted to testify. I think this is leading and suggestive. [385] THE COURT: Try to exhaust the witness' recollection as to the entire conversation first, Mr. Armstrong.

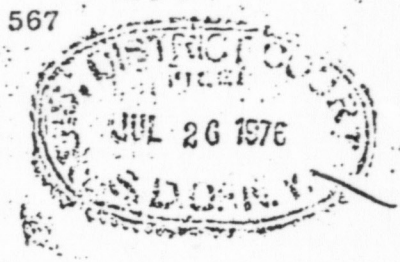
Q Do you recall anything further said in the conversation? A No, Sir.

Q Do you recall anything being said as to the signficance of Mr. Wolfson's being on the board or considered to be on the board? Why was it that that required your refusing his stock? A May I have the question again, please?

Q Do you recall saying anything to Wolfson as to why his or his representatives being on the board made it necessary for you to refuse to handle the orders in the account? A Because when they went on the board and our firm viewed it as though Mr. Wolfson was on the board, since they were his representatives, he would then become a restricted person as far as sales. I could accept no further sales in American Motors from Mr. Wolfson, his family or his associates.

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CR 169 OPIN 567



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

-against-

LOUIS E. WOLFSON,

Defendant

66 Cr. 720
(ELP)

44847

----------x

A P P E A R A N C E S

FENSTERWALD & OHLHAUSEN, ESQS.
910 Sixteenth St., N.W.
Washington, D.C. 20006
Attorneys for Petitioner Wolfson

BERNARD FENSTERWALD, JR., ESQ.
Of Counsel

BASS & ULLMAN, ESQS.
747 Third Avenue
New York, N. Y. 10017
Co-Counsel for Petitioner

By ROBERT ULLMAN, ESQ.

ROBERT B. FISKE, JR., ESQ.
United States Attorney for the
Southern District of New York
One St. Andrew's Plaza
New York, N. Y. 10007

ANGUS MACBETH, ESQ.
Assistant United States Attorney
Of Counsel

7/30/76

PALMIERI, J.

This is a voluminous petition to set aside the judgment of conviction of Louis E. Wolfson entered on November 28, 1967, after a jury found him guilty, on September 29, 1967, of violating and conspiring to violate the federal securities laws. United States v. Wolfson, 66 Cr. 720 (the Continental Enterprises case). The conviction was affirmed. United States v. Wolfson, 405 F.2d 779 (2d Cir. 1968), and certiorari denied, 394 U.S. 946 (1969). A motion for a new trial on grounds of newly discovered evidence was made on October 9, 1968. Following a lengthy evidentiary hearing, the motion was denied, 297 F. Supp. 881 (S.D.N.Y. 1969), and the denial was affirmed by the Second Circuit, 413 F.2d 804 (1969).

The petitioner was indicted, tried and convicted on other charges, United States v. Wolfson, 66 Cr. 832 (the Merritt-Chapman & Scott case), but the conviction was reversed by a divided court, 437 F.2d 862 (2d Cir. 1970), and subsequent trials of the petitioner resulted in jury disagreements and eventually in a nolle prosequi.

The Procedural Status of the Petition

Due to the complexity of the proceedings had and the multiplicity of the papers involved on this petition, it will clarify matters to trace briefly the activities that have occurred since the filing of this petition.

Contrary to the local rules of this court, the petitioner sought unsuccessfully to place this petition, filed May 16, 1975, before the Chief Judge of this court, or a judge other than the trial judge. He addressed it specifically to the Chief Judge, who refused to accept it, and then attempted to have it put on the court's motions calendar in Part I. Having failed in this maneuver, the petitioner filed on June 18, 1975, a motion for recusal of this Court. This motion was denied in an opinion dated July 23, 1975, on substantive grounds as well as on the procedural grounds that the affidavit by petitioner and the certificate by his counsel, as required by 28 U.S.C. § 144, were not supplied.

By letter dated July 24, 1975, the Court gave certain directions to petitioner's counsel. The letter noted that the petition papers gave an impression of lack of familiarity with the record in this case and thus vastly complicated the burden

on the United States Attorney and on the Court. Petitioner's counsel was asked to submit an affidavit stating that he had made a conscientious study of all relevant documents referred to in the petition, identifying which of the petition's points had and which had not been previously litigated, and noting which points related to the Continental Enterprises case and which to the Merritt-Chapman case. The purpose of these directions was to bring within a manageable compass petitioner's wide-ranging and partially repetitive allegations.

On August 21, 1975, petitioner filed a motion for reconsideration of the motion for recusal. In the papers submitted therewith, the petitioner indicated his intent to ignore the directions contained in the Court's letter of July 24, cavalierly disposing of the errors in the petition by stating that "they will be pointed out by the Government and taken into account by the Court."

The Court, in an opinion dated September 16, 1975, granted the request for reconsideration and denied the motion both on substantive grounds and for failure to remedy the procedural deficiencies. The Court reiterated its directions and stated its intent to dismiss the petition if counsel refused to comply.

On November 7, 1975, the petitioner's counsel filed an affidavit stating he had made a review of some of the documents but that he could not comply with the directions fully, alleging that the court's records were in shambles. Although the Court had pointed out in one of its interim opinions that there was no conviction or judgment in the Merritt-Chapman case and that a coram nobis petition could not be properly availed of in that proceeding,[1] the attorney for the petitioner stated that, notwithstanding the Court's directions, he did "not find it feasible to assign most 'points' to either the Continental case (66 Cr. 720) or the Merritt-Chapman Scott case (66 Cr. 832) exclusively as most 'points' apply in one degree or another to both cases."

The Government answered this affidavit on January 12, 1976, and the petitioner replied to the Government's answer on February 6, 1976.

On February 9, 1976, the Court filed an opinion directing the petitioner's counsel to comply with its prior order and to submit information as to which documents in the court's records he claimed were missing or unavailable. The purpose of the latter directive was to clarify what documents, if any, were missing or unavailable, to help locate them, and to clear the petition of collateral issues.

On March 8, 1976, petitioner's counsel sent the Court a letter which indicated that he did not intend to comply with the Court's outstanding directives. Consequently, the Court, on March 22, 1976, noting this, ordered the Government to submit its answer on the merits of the petition so that the Court could proceed to a disposition of the matter.[2]

Thereafter, on April 8, 1976, the petitioner's counsel sent the Court a letter that can only be described as inflammatory and which indicates a tendency to misstate or selectively overlook facts of record. For example, the letter upbraided the Court for not having required the Government to answer the petition when just such an order had been entered the previous month.

By this letter, counsel also sought to move for an order permitting interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Counsel was informed that this should be done by formal motion in accordance with the rules of the court.

The Government filed its answer together with affidavits by Paul R. Grand and Paul B. Galvani on April 20, 1976. The petitioner then requested and was granted permission to reply to the Government, which he did on May 10, 1975. The Government then requested an opportunity to submit a supplemental

answer. The Court reluctantly granted this request because the petitioner had used the opportunity for reply to inject new matters into the proceeding and to make new factual allegations. The Government's supplemental answer was filed on June 1, 1976, together with affidavits by Michael F. Armstrong, Angus Macbeth, William A. McRitchie and Robert M. Morgenthau.

The Petition Should be Dismissed for Failure to Follow the Court's Directions

Apart from anything else that might be said hereafter, petitioner's counsel has acted in flagrant disregard of the Court's directions, has chosen to proceed as if many of his charges had never been litigated, has made scattershot and broadside attacks on two criminal proceedings although only one of them ended in a judgment of conviction and has any pertinence to this petition. He has shirked his responsibility for clear and precise argument, has sought to place the burden of identifying and correcting his misstatements on the Court and the United States Attorney. Because of the disregard of this Court's directions, this Court concludes that there is sufficient basis to deny the petition with prejudice. Rule 41(b),

Fed. R. Civ. P. See Harris v. Nelson, 394 U.S. 286, 299 (1969), 28 U.S.C. § 1651.

However, notwithstanding this conclusion the Court hereinafter discusses the petitioner's allegations in order to demonstrate that there are additional and persuasive grounds for the denial of the petition.

The Motion for Recusal

The opinions and orders of July 23, 1975, and September 16, 1975, disposed, among other matters, of the petitioner's motion for recusal of this Court. All that can be said that is relevant to this issue has been set forth in these two opinions and the matter need not be discussed again here, except to say that this Court reaffirms in every respect all that was there set forth. It should be noted that item (b) of petitioner's Motions for Discovery was satisfied by Appendix A to the opinion of July 23, 1975. The same opinion disposed of item (g) of the Motions for Discovery.

The Standards Governing a Petition for a Writ of Error Coram Nobis

At the outset, a review of the legal standards which apply to a petition for a writ of error coram nobis, and thus to all of petitioner's points

and allegations, is in order. This is done so that it will not be necessary to restate and apply these standards to each of the numerous issues petitioner raises.

The writ of error coram nobis is an extraordinary remedy to be applied only under the most compelling circumstances to correct errors of the most fundamental character. United States v. Morgan, 346 U.S. 502, 512 (1954); United States v. Cariola, 323 F.2d 180, 184 (3d Cir. 1963); United States v. Malinsky, 310 F. Supp. 523, 524 (S.D.N.Y. 1970).

> Continuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice.

United States v. Morgan, supra, 346 U.S. at 511.

In considering such a writ, a presumption of regularity attaches to the challenged proceedings and the burden of overcoming that presumption is placed on the petitioner. United States v. Morgan, supra, 346 U.S. at 512; Bruno v. United States, 474 F.2d 1261, 1263 (8th Cir. 1973); Ybarra v. United States, 461 F.2d 1195, 1198 (9th Cir. 1972); United States v. Cariola, supra, 323 F.2d at 184.

The function of the writ is to correct mistakes of fact not law. Bronson v. Schulten, 104 U.S. 410 (1881). Even then, the mistakes of fact must not be attributable to the negligence of the petitioner and must be of such a fundamental character as to render the proceeding itself irregular and invalid. United States v. Morgan, supra, 346 U.S. at 507; United States v. Mayer, 235 U.S. 55, 68 (1914); Moon v. United States, 272 F.2d 530, 532 (D.C. Cir. 1959). The purpose of the writ is "to bring to the attention of the court some fact unknown to the court, which if known would have resulted in a different judgment." Allen v. United States, 162 F.2d 193, 194 (6th Cir. 1947).

Issues that have already been adjudicated upon trial or appeal may not be raised in a collateral attack, whether that attack b a coram nobis petition, Murgia v. United States, 448 F.2d 1275, 1276 (9th Cir. 1971), Jackson v. United States, 394 F.2d 114, 115 (5th Cir. 1968), or a petition under 28 U.S.C. § 2255 which is the modern equivalent of a coram nobis petition, Meyers v. United States, 446 F.2d 37 (2d Cir. 1971); United States v. Thompson, 261 F.2d 809, 810 (2d Cir. 1958). As a necessary corollary to this rule, it is also clear that issues

plainly available for consideration at trial or on appeal may not be raised. Williams v. United States, 463 F.2d 1183, 1184 (2d Cir. 1972), aff'g, 334 F.Supp. 669, 671 (S.D.N.Y. 1971), cert. denied, 409 U.S. 967 (1972).

Petitioner is entitled to an evidentiary hearing only if he alleges facts that would support a claim of constitutional dimensions, Smith v. O'Grady, 312 U.S. 329 (1941) and puts some material issue of fact into dispute. Walker v. Johnston, 312 U.S. 275, 284-85 (1941); United States v. Carlino, 400 F.2d 56, 58 (2d Cir. 1968), cert. denied, 394 U.S. 1013 (1969); United States v. Tribote, 297 F.2d 598, 600 (2d Cir. 1961). The Court is not obliged to accept as facts mere conclusory allegations asserted by the petitioner or his counsel. Accardi v. United States, 379 F.2d 312, 313 (2d Cir. 1967); United States v. Tribote, supra, 297 F.2d at 601.

Wolfson's petition has failed to meet these standards.

The Issues Already Litigated

Petitioner's counsel has conceded that a number of issues have already been litigated and therefore can form no valid part of the basis for this petition. The Government is quite correct,

therefore, in ruling out of these proceedings the following issues: a) alleged intimidation of witness Henry Steger; b) alleged discriminatory prosecution; c) change of venue; and d) alleged judicial bias and prejudice.

The "Slight Acquaintance" of the Foreman of the Grand Jury with the Trial Judge

The petitioner states that the foreman of the grand jury which indicted him has stated that he had a "slight acquaintance" with this Court. This Court has specifically denied any recollection of this grand juror or of any evidence of any connection with him in its opinion of July 23, 1975. There is no demonstration of the factual basis upon which this statement is based. Petitioner has been unable to obtain an affidavit from the foreman and apparently is no longer pressing this point. In his affidavit dated September 15, 1975, petitioner's counsel describes a meeting with the foreman but does not mention this issue. The foreman, in his affidavit submitted by the Government, does not mention it.

Even if it were true that the foreman had a "slight acquaintance" with this Court, that would not entitle Wolfson to any relief. This Court did not empanel the grand jury or select its foreman.

See Opinion of July 23, 1975, at 4. Wolfson's "fascinating questions" are so baseless and far-fetched as not to warrant comment much less an evidentiary hearing.

Allegations Regarding the Grand Jury

In addition to petitioner's allegations concerning the trial court's role in the grand jury proceedings, which was shown to be nonexistent in prior opinions, petitioner raises a number of other issues concerning the grand jury. These include the selection of the foreman, the relationship of the foreman to the United States Attorney, and to the Government's trial counsel, and the voting of a true bill.

As to petitioner's question whether the indictment was actually voted upon by the grand jury, the grand jury record book for the August 9, 1966 Special Grand Jury shows that the true bill in this case was voted on September 19, 1966, at which time 19 grand jurors were present and voted unanimously in favor of this true bill. In addition, attacks on an indictment and the institution of prosecution must be raised before trial. Rule 12(b)(1) and (2), Fed. R. Crim. P. Petitioner attacked the grand jury at the proper time but did not raise this issue. It is foreclosed to him now.

Petitioner's claims regarding Foreman McRitchie require somewhat more comment. Apparently McRitchie knew Michael Armstrong, the Assistant United States Attorney in charge of presenting this case to the grand jury, and Robert M. Morgenthau, the United States Attorney at that time. Petitioner claims that McRitchie "admitted" knowing Morgenthau "well" and Armstrong "intimately." Petitioner further claims that:

> McRitchie has said that he was "concerned" when Michael Armstrong walked in the jury room to present the Wolfson cases. His concern led him to go hurriedly to see his friend, Morgenthau, to whom he explained the situation. According to McRitchie, Morgenthau said that he did not think his intimate friendship with prosecutor Armstrong was "justification for my being relieved."

Petitioner does not say when, where or to whom McRitchie made this "post-trial admission." The only support petitioner offers for his version of this matter is an affidavit by his counsel dated September 15, 1975. In the affidavit, counsel says he visited McRitchie who "acknowledged that he had been a life-long and intimate friend of Michael Armstrong" and said that, because he thought the situation might be improper, "he went to his friend, Robert Morgenthau" who "assured him that it was 'alright.'"

Petitioner's counsel makes much of what he terms the "life-long and intimate" friendship between McRitchie and Armstrong but said he had "no way to force Mr. McRitchie to confirm this by way of affidavit." In point of fact McRitchie denied such a relationship. Additionally, Mr. McRitchie resisted the thinly veiled threat of public embarrassment made by petitioner's counsel.[3]

The petitioner's and his counsel's views of the matter are in contrast to statements in the affidavits of McRitchie, Armstrong and Morgenthau submitted by the Government.[4]

Morgenthau recalls meeting McRitchie two or three times with Morgenthau's father at the bank where McRitchie worked and then, after the sitting of the grand jury in question, several times as trustee on matters involving his father's estate. He states: "This was a business relationship, and I was not a personal or social friend of McRitchie." He further states that, apart from telling Armstrong that he thought it was proper for McRitchie to serve on the grand jury, he "had no conversation with or about McRitchie concerning any grand jury matter," and did not personally appear before the grand jury in question.

Armstrong says that McRitchie's son and he were classmates during the last few years of grade school and through high school. They were "close friends" in the fourth or fifth grades of grammar school and they thereafter saw less of each other and "grew to have different circles of friends." He states that "almost all" of his occasional contacts with McRitchie were during grade school and "all of them were in passing." Between graduation from high school in 1950 and the time the grand jury was convened, Armstrong says he may have seen McRitchie "briefly on, at most, two or three occasions."

McRitchie's affidavit confirms in detail Morgenthau's and Armstrong's descriptions of their relationships to him. He states that his "relationship to [Morgenthau] was a business one rather than one of personal friendship," and that "[i]t is inaccurate to describe Armstrong as 'a life-long and intimate friend of mine.'"

McRitchie also states that he was visited by investigators on November 9, 1970, and again on July 2, 1974, regarding his service on the grand jury in question. One or both of these visits presumably form the basis of what petitioner has set

forth as McRitchie's "post-trial admission[s]." If McRitchie's statements during those visits were the same as the statements in his affidavit -- the Court assumes this to be the case, having no reason to think otherwise -- then they become very significant. They show the extent to which petitioner has gone in abstracting from the facts in order to make assertions in support of his position. He has started with a few basic facts and drawn therefrom conclusions which, although they are not inconsistent with these facts, find no direct support therein. The most obvious example is the inflation of the few casual meetings many years before between McRitchie and Armstrong into "a life-long and intimate friend[ship]." This tendency to hyperbole has constrained the Court to subject all of petitioner's allegations to the utmost scrutiny.[5]

In any event, petitioner has made an insufficient showing to obtain relief on this issue. In the Second Circuit, one seeking to upset his conviction on the ground of impermissible bias of a grand juror must show actual prejudice, not mere speculation. United States v. Remington, 191 F.2d 246, 252 (2d Cir. 1951), cert. denied, 343 U.S. 907 (1952). On a coram nobis petition this showing must overcome the presumption

of regularity in the proceedings of the court, as noted earlier.

Courts have consistently rejected challenges to the impartiality of grand jurors where direct proof of undue influence was lacking. Castle v. United States, 238 F.2d 131, 135-36 (8th Cir. 1956); United States v. Remington, supra; United States v. Anzelmo, 319 F. Supp. 1106, 1113-14 (E.D. I . 1970); United States v. Brandt, 139 F. Supp. 349 (N.D. Ohio 1955); United States v. Fujimoto, 102 F. Supp. 890 (D. Ha. 1952); United States v. Smyth, 104 F. Supp. 283 (N.D. Cal. 1952). Here, petitioner has presented no more than speculation that foreman McFitchie was improperly influenced by his prior associations with Armstrong and Morgenthau. No actual prejudice has been shown and McRitchie himself pointedly denies any prejudice, bias or undue influence.

Even if petitioner could show that McRitchie was biased, he would be entitled to no relief. "[T]he majority rule is that a defendant has no constitutional right to an impartial grand jury." United States v. Archer, 355 F. Supp. 981, 988 (S.D. N.Y. 1972). Accord, Gorin v. United States, 313 F.2d 641, 645 (1st Cir. 1963), cert. denied, 379 U.S. 971 (1965); United States v. Anzelmo, supra; United

States v. Knowles, 147 F. Supp. 19 (D.D.C. 1957); United States v. Smyth, supra. An indictment will stand as long as it was voted by 12 grand jurors after deducting those not legally qualified, Rule (6)(b)(2), Fed. R. Crim. P. Petitioner's claims do not warrant dismissal of the indictment here because this indictment was voted by 6 more grand jurors than the requisite 12 even if McRitchie is considered legally or otherwise disqualified. United States ex rel. McCarin v. Thompson, 144 F.2d 604 (2d Cir.), cert. denied, 323 U.S. 790 (1944)(L.Hand, J.). Accord, Castle v. United States, supra; United States v. Anzelmo, supra; United States v. Fujimoto, supra. This rule of law also forecloses petitioner's claims regarding McRitchie's selection to be on the grand jury.

Petitioner suggests that McRitchie's position as foreman afforded him influence of such magnitude that bias on his part would necessarily infect and invalidate the entire grand jury process. This contention must be rejected because there is no showing that McRitchie did exercise undue influence and no reason to believe that he may have, given his direct denial thereof. An indictment is merely an accusation. Since there stands between this accusation of petitioner and his subsequent conviction the

unanimous finding beyond a reasonable doubt of a petit jury of 12, there is no reasonable basis for granting petitioner relief on this basis.

Nor is there a basis for an evidentiary hearing on this issue. The hearsay and assertions put into the record by petitioner and his counsel do not qualify as proper evidential material that might warrant a hearing. D'Ercole v. United States, 361 F.2d 211, 212 (2d Cir.), cert. denied, 385 U.S. 995 (1966). See United States v. Franzese, 525 F.2d 27 (2d Cir. 1975). See also the authorities cited earlier in this opinion. Given the extensive effort of petitioner to obtain evidence on this issue, as revealed by the McRitchie affidavit and the attachment thereto, one may assume he has put forth all material evidence in his possession. Not only is this Court convinced that petitioner could not prove the allegations he has made on this issue, but, taken as true, they are insufficient as a matter of law to warrant the relief he seeks.

The Alleged Threats to George B. Green

Here a stockbroker who was a grand jury witness is alleged to have been threatened by two United States Attorneys, Michael Armstrong and Paul

Galvani. The alleged incident involving Mr. Galvani took place in 1968, after the conviction here sought to be vacated, and involved the Merritt-Chapman case which has no relevance to this proceeding. The incident allegedly involving Mr. Armstrong was nothing more than a reminder to a prospective grand jury witness that he faced the penalties for perjury if he lied. Not only is there no showing of a threat, Green, in his affidavit, Exhibit VI(A), gives no indication, nor is there any other evidence, that Green's testimony was in any way impaired or affected. Additionally, there is nothing to indicate that Green was not available to Wolfson as a witness at the trial.

Petitioner's Attack Upon His Trial Counsel

Petitioner claims his counsel, Mr. Gould and Mr. Glickstein, were either grossly negligent or disloyal "or some of each." He states the test for gross negligence to be "ineptitude . . . so extensive that the entire proceedings were a farce and a mockery of justice . . .", citing, inter alia, United States ex rel. Boucher v. Reinke, 341 F.2d 977 (2d Cir. 1965) and United States v. Wight, 176 F.2d 376 (2d Cir. 1949). He further states that the sixth amendment right to effective assistance of counsel has been denied due to disloyalty or conflict of interest on the part of

counsel only when "the circumstances . . . demonstrate that which amounts to a lawyer's deliberate abdication of his ethical duty to his client, Robinson v. United States, 448 F.2d 1255 (8th Cir. 1971)."

Petitioner attempts to show ineffective assistance of counsel by complaining of various decisions before and at trial, including the decisions not to devote more time to the study of corporate files, not to attempt to interview a witness, not to make a Rule 16 motion, not to introduce various pieces of evidence and not to have a grand jury witness assert the attorney-client privilege. The Court has reviewed each of these issues and finds that each of the decisions, far from demonstrating gross negligence, was well within the range of competence demanded of attorneys in criminal cases. The facts here bear no resemblance to those in the case cited by petitioner, Ray v. Rose, 491 F.2d 285 (6th Cir. 1974). The attack petitioner makes upon his counsel is tantamount to a hindsight reappraisal of his defense and the preparation for it. A coram nobis petition will not lie to review the tactics complained of here. See Smith v. United States, 187 F.2d 192 (D.C. Cir. 1950), cert. denied, 341 U.S. 927 (1951); Lampe v. United States, 288 F.2d 881, 882 (D.C. Cir. 1961)(en banc).

To demonstrate that his counsel were disloyal, petitioner alleges his belief that they were "threatened with prosecution" in various matters involving the SEC. The implication, never stated, was that his counsel allowed the United States Attorney and the SEC to convict petitioner in exchange for their own freedom from prosecution. The proof offered is twofold. The first is the fact that neither counsel was indicted although Glickstein was an unindicted co-conspirator in the later Merritt-Chapman case and petitioner believes there was a "criminal reference report" which recommended prosecution of Mr. Gould in connection with the Canadian Javelin case. The second is a speech-article by Dean Monroe Freedman of Hofstra School of Law, one proposition of which is that the New York securities bar is overly compliant to SEC wishes.

Petitioner further alleges that his trial attorney, and two partners, had proprietary interests in a New York stock exchange firm in the sixties, possibly while Mr. Gould represented petitioner. Petitioner's theory here apparently is that interest in such a firm, "very closely regulated by the S.E.C.," would necessarily taint Mr. Gould's representation of petitioner in a securities trial. This is a patently insufficient claim of conflict of interest.

Even if, contrary to the findings made above, the counsel's actions complained of had been of a nature to suggest ineffective representation, the evidence presented (assuming there was a criminal reference rep rt) is far too paltry to warrant the gigantic leap from less-than-perfect representation to the affirmative deliverance (deliberate or otherwise) of petitioner into the hands of the prosecutor for personal reasons. The Court cannot let itself be carried this far by petitioner's suspicions and fears. Petitioner was well served at trial by Mr. Gould, a distinguished member of the New York bar, and Mr. Glickstein of Jacksonville, Florida, petitioner's old friend and associate who acted as his house counsel and was one of his witnesses at trial. His attack on their representation of him does not approach a showing of "deliberate abdication of [their] ethical duty to [their] client."

Since it reaches this conclusion, the Court declines to grant items (d), (e) and (f) of petitioner's Motions for Discovery.

The Alleged Conflicts of Interest of Paul Grand and Arthur Liman

The petition makes the utterly unfounded statement that Mr. Grand was "one of the prosecutors

in the Continental case." Mr. Grand's affidavit demonstrates that he played no role in the trial or appeal of the Continental case. He became chief trial counsel for the Government in the Merritt-Chapman case, which has no relevance to this petition, in February 1968, approximately a year and a half after petitioner's indictment in both cases and approximately 5 months after the jury found petitioner guilty in the Continental case. His only role in the Continental case was to represent the Government on the petitioner's motion for a new trial in October 1968, over a year after petitioner's conviction.

The conflict of Mr. Grand is predicated on an alleged relationship between petitioner's co-defendant Gerbert and Mr. Grand's father, from 1955 to 1957, while both were directors of a corporation in St. Louis, Missouri. Mr. Gerbert says the relationship was marked by "continuous disagreements" culminating in "a very heated argument," Mr. Grand pere's forced removal from the board, and "much bitterness all around." Mr. Grand fils states that he was away from home in the Army and law school during this period and his "knowledge of the business relationship between Mr. Gerbert and my father has always been almost non-existent." On these facts

this Court must conclude that this conflict is not only unrelated to this petition but is also too nebulous, absent a showing of harm, to warrant relief in any case. This is another instance of petitioner's attempts to lump the two prosecutions together despite the repeated orders of this Court.

Mr. Liman acted as attorney for a co-defendant in the Merritt-Chapman case. He had nothing to do with the Continental Enterprises case. What has already been said with respect to the attack on Mr. Grand applies equally here.

The Alleged Conflict of Interest of Paul Galvani

Mr. Galvani, now a member of a Boston law firm, served at one time as law clerk to the trial court. He subsequently served as an Assistant United States Attorney between 1966 and 1970. He took no part in the Continental Enterprises case except with respect to certain pretrial motions which were heard and decided many months before trial. He was later to serve as a deputy to Mr. Grand in the Merritt-Chapman case. His relationship to the trial court was raised and summarily rejected as a ground for recusal by the Court of Appeals in Wolfson v. Palmieri, 396 F.2d 121, 123 (2d Cir. 1968). Here again the petitioner seeks to relitigate an issue already decided against him.

The Alleged Perjury of Allen and Morley

The petitioner attacks as perjurious the testimony of two Goverrment witnesses, John Morley and Stuart Allen. Both claims are insubstantial.

The heart of petitioner's claim against Morley is that there are differences between Morley's testimony before the SEC in 1965 and his trial testimony and that Morley allegedly admitted to one Michael C. Holloway that he had lied before the SEC in order to support petitioner's co-defendant Gerbert. Before cross-examination of Morley, the defense was given the relevant parts of Morley's SEC testimony (Exhibit 3504A) and had sufficient opportunity to exploit any material differences between Morley's prior testimony and what he said at trial. Morley's testimony was also attacked unsuccessfully on appeal. Appellants' Brief, United States v. Wolfson and Gerbert, 2d Cir. Dkt. No. 31993 at 8-10; 49-50.

Petitioner is entitled to no relief on this claim. Since this matter was available for litigation at trial and on appeal, it may not be raised in this petition. Furthermore, there is no offer of proof that Morley perjured himself at trial as opposed to before the SEC. And finally, petitioner has not even attempted to show any harm to himself by Morley's

allegedly perjured testimony before the SEC, which Morley is said to have labeled "a very minor thing."

Petitioner's claims relating to the excision of the 3500 material are foreclosed to him because they were available to him on appeal. Title 18 U.S.C. § 3500(c) provides a procedure for objection to and appeal from excision of material by the trial court:

> If, pursuant to such procedure [for the excision of 3500 material], any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge.

Petitioner's failure to avail himself of this procedure forecloses the matter to review by coram nobis petition.

Moreover, petitioner's excursion into the area of the 3500 material is a hollow issue. First, witness Duncan's testimony is not so easily discredited as petitioner would assume. Duncan testified that SEC lawyer Kelly met with petitioner Wolfson in 1950 and explained registration requirements to him. The fact that the meeting may have "related to

'manipulation'" rather than the sale of unregistered stock -- if indeed such a facile distinction can be made in this situation -- is irrelevant if the meeting included this explanation of registration requirements as Duncan testified and Kelly's memorandum shows. Moreover, the SEC letter of January 11, 1951, attached to the affidavit of petitioner's counsel filed November 13, 1975, clearly shows that the Capital Transit matter involved "a secondary distribution of unregistered stock on behalf of controlling persons."

More importantly, the main thrust of this claim, as petitioner admits, relates to the "relative 'guilt' of Wolfson, the defendant, versus Morley, the prosecution witness." This is a contention that was unsuccessfully presented at trial. Petitioner appears unable or unwilling to grasp the fact that Morley's knowledge cannot exculpate the petitioner. The evidence and testimony objected to was presented to demonstrate that petitioner was aware of the registration requirements. Evidence that shows Morley to have had the same awareness proves nothing.

As with his other claims, petitioner's assertions on this issue show no error of constitutional dimensions and raise no factual dispute warranting an evidentiary hearing.

Allen, an employee of the SEC who did a great deal of work on the Continental Enterprises case, gave testimony before the grand jury with respect to interviews with the brokers at ten different brokerage houses through which Continental stock had been sold. The part of the interviews that Allen related focused on the brokers' description of their practices regarding compliance with SEC regulation of sales of unregistered stock by control persons. Petitioner claims that the testimony at trial of some of these brokers shows Allen to have been lying to, or at least wilfully misleading, the grand jury. Petitioner sets forth Allen's testimony regarding two of these brokers followed by the brokers' testimony at trial. These quotes, presumably the two examples most supportive of petitioner's position, do not even remotely suggest that Allen's testimony was either perjurious or wilfully misleading. Allen testified before the grand jury as to the general operating practices of the brokers as they recounted them to him. At trial neither broker in any way denied those practices or that he had told Allen that those were his practices. The brokers' testimony indicates that they made only generalized inquiries to sellers of stock regarding control problems.

Petitioner's implication that Allen told the grand jury that the brokers had made extensive, detailed inquiry is unsupported by the transcript.

Allegation of Misleading the Jury

This issue had to be, and was, raised on direct appeal. See Appellants' Brief, United States v. Wolfson and Gerbert, 2d Cir. Dkt. No. 31993 at 15. Since petitioner has presented no new facts regarding this claim, it cannot be raised anew.

Allegations of an SEC "Enemies" List, Discriminatory Prosecution and Impermissible Prosecutorial Purpose

Even if an SEC "Enemies" list existed and petitioner's name was on it, the petitioner would not be entitled to relief. He has not shown that he was injured or prejudiced thereby other than to assert that "the very purpose of such lists was to harass and, where possible, jail those who were placed thereon, whether guilty of a crime or not." This unsupported assertion cannot warrant vacating a conviction by a unanimous jury verdict. And the occurrence of the concatenation of events collectively known as Watergate does not offset the fact that, as petitioner concedes, the issue of discriminatory prosecution has already been litigated.

The charge of impermissible prosecutorial purpose in this case is equally unsupported. The extensive account of petitioner's life, work and speeches proves nothing. He has conceded that the change of venue issue has been litigated. And the third-hand hearsay statements that reportedly were made by officials of the Department of Justice all refer to the Merritt-Chapman case and are irrelevant here.

Conclusion

This petition presents a hodge-podge of matters relating to two criminal proceedings of which only one ended in a judgment of conviction. They are frequently repetitions of matters already litigated. They seek, in some instances, to raise issues that could have been availed of at trial or on appeal. In many instances, particularly where perjury and conflicts of interest are charged, the factual bases are lacking and the assertions of the petitioner are based upon conclusory allegations and innuendoes. Recognizing the weakness of his claims, petitioner has taken the stance that "his constitutional right to a fair trial was not denied by any one particular 'point,' but that the totality of the denials clearly adds up to a lack of due process under law."

This Court does not accept the premise that legally insufficient allegations can be summed to total a claim sufficient to overturn at this late date a thoroughly contested and appealed jury verdict. Moreover, the petition, considered in toto, does not present "circumstances compelling [a grant of relief] to achi e justice." United States v. Morgan, supra, 346 U.S. at 511. For these reasons, and because of petitioner's failure to obey the repeated orders of the Court with respect to the submission of his contentions, this petition must be denied.

Petition denied in all respects. It is so ordered.

Dated: New York, N. Y.
July 26, 1976

EDMUND L. PALMIERI
U. S. D. J.

FOOTNOTES

1. The petition was filed in the Continental case only, Docket No. 66 Cr. 720.

2. Since this order took the form of a letter to all counsel and reference is made in it to petitioner's counsel's letter of March 8, 1976, a word of explanation is necessary. The first paragraph of this letter referred to "a transcript of the February 19 meeting in chambers." This meeting was necessitated by the circulation of a scurrilous letter by the petitioner, while the petition was sub judice, covering about 27 printed pages in which he accused the trial court of conducting "kangaroo" proceedings, of having shown favoritism to highly publicized criminals and mafia figures, and of having engaged in numerous other misdeeds. He also accused the prosecutor and an official of the S.E.C., as well as the trial court, of participating in a "scheme to frame" him and of "railroading" him, adding that he could fully document his charges, inviting a lawsuit if he could not prove them, and asserting his financial responsibility and lack of immunity. This letter has been placed under seal and made part of the record in these proceedings. At the February 19th meeting petitioner's counsel declined to concede that this letter was either libelous or scurrilous. The letter, addressed to the Editor of the New York Times, was circulated to two other New York daily newspapers, and to a number of persons occupying positions of importance in the legal profession and in Government.

3. See the letter of petitioner's counsel to McRitchie, dated July 9, 1974, attached to McRitchie's affidavit.

4. These three affidavits, plus the affidavit of Assistant United States Attorney Argus Macbeth, answer the questions posed by petitioner as a basis for items (a) and (c) of his Motions for Discovery. Therefore, those requests for discovery are denied. Moreover, petitioner's request for the entire grand jury minutes, as most of his other requests, is a dragnet spread

to gather information to add to the irrelevant and immaterial matter that already bloats his papers. Petitioner has not justified any discovery at this late stage regarding his fiercely contested and thoroughly litigated conviction, particularly since he admits that he has not raised a single issue that rises to the constitutional significance necessary for relief.

5. Following the procedure for a petition pursuant to 28 U.S.C. § 2255, the Court has not used the Government's affidavits as a basis for finding any of petitioner's allegations to be false, though it does rely on them in assessing the sufficiency of petitioner's and his counsel's affidavits. United States v. Franzese, 525 F.2d 27, 31 (2d Cir. 1975) and cases cited there.

1 Copies Received

Date November 17, 1976

Filed Hon. Robt. B. Fiske, Jr.

By Eugene M. O'Neill